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A
TREATISE
ON THE
LAW OF SALES
OF
PERSONAL PROPERTY.

BY FRANCIS HILLIARD,

AUTHOR OF "AN ABRIDGMENT OF THE AMERICAN LAW OF
REAL PROPERTY."



NEW YORK:
HALSTED AND VOORHIES.

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PREFACE.

THE following work has been compiled, in consequence of a strong conviction in the mind of the author, that a full and complete treatise upon the subject herein considered, embodying both the English and American decisions, was a *desideratum* to the American lawyer. This impression, previously very decided, was much confirmed by a remark of the learned Editor of *Long on Sales*, that his desire and first intention was, to prepare an original treatise, instead of a new edition of the English work, but that he was prevented from doing so by the pressure of professional engagements; and by an observation of the reviewer of that work in the *American Jurist*, to the effect that another book upon the subject was still much needed by the profession. The general plan of the treatise is similar to that of the author's work upon *Real Property*; for the favorable

reception of which, he takes this occasion to express his thanks to his brethren of the bar in many different States of the Union ; accompanied by the hope, that the present work will receive, and still more that it may be found to deserve, the same liberal encouragement at their hands.

Boston, March, 1841.

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THE HISTORY OF THE

REPUBLIC OF THE UNITED STATES OF AMERICA

FROM THE FOUNDATION OF THE COLONIES TO THE PRESENT DAY

BY JAMES M. SMITH, LL.D., F.R.S.E., F.R.S.

LONDON: PUBLISHED BY J. B. LIPPINCOTT, 15, N. B. STREET, 1854.

1800	Population of the United States	3,929,214
1810	Population of the United States	7,240,060
1820	Population of the United States	12,265,000
1830	Population of the United States	17,069,000
1840	Population of the United States	23,802,000
1850	Population of the United States	31,000,000
1860	Population of the United States	39,819,000
1870	Population of the United States	50,155,000
1880	Population of the United States	62,948,000
1890	Population of the United States	76,212,000
1900	Population of the United States	92,228,000
1910	Population of the United States	106,000,000
1920	Population of the United States	123,204,000
1930	Population of the United States	150,700,000
1940	Population of the United States	163,000,000
1950	Population of the United States	165,000,000
1960	Population of the United States	179,300,000
1970	Population of the United States	203,300,000
1980	Population of the United States	226,500,000
1990	Population of the United States	253,600,000
2000	Population of the United States	281,400,000
2010	Population of the United States	312,000,000
2020	Population of the United States	331,000,000

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THE LAW OF SALES

OF

PERSONAL PROPERTY.

CHAPTER I.

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The following general principles have been laid down, as to what constitutes a sale.

1. A sale of goods and chattels is a transmutation of property from one to another, accompanied, when practicable, with de-

livery to the purchaser, in consideration of some price or recompense in value.(1)

2. A sale may be good in part and void as to the residue, on which some third person has a prior lien. It may be good between the parties and void as to creditors : or valid as to some creditors, and void against others.(2)

3. Independently of the Statute of Frauds, any words importing a bargain, whereby the owner signifies his willingness and consent to sell, and the other party his willingness and consent to buy, *in presenti*, for a certain price, constitute a sale and transfer.(3)

4. The making of a bargain for a chattel and payment of the price constitute an executed contract, upon which the vendee may maintain trover for the thing sold.(4)

5. By the law of England, the sale of a specific chattel passes the property without delivery. The doubt as to this point expressed in the case of *Bailey v. Culverwell*,(5) can apply only to a sale of goods *generally*, where the particular articles are not ascertained.(6)

6. Two things are essential to a transfer of the title to personal property upon a cash sale ; payment by the vendee, and actual or constructive delivery.(7)

7. In general, if no credit is given, property does not pass by a sale, till payment be made. Blackstone says, it is no sale without payment, unless the contrary is expressly agreed. Perhaps this is too strong language, as an intention to give credit may be sometimes *implied*. But such intention must unequivocally appear from the acts and declarations of the parties.(8)

(1) Per Hosmer, Ch. J., *Patten v. Smith* 5 Conn. 199. Noy's Max. ch. 42. Shep. Touch. 224. *Denn v. Diamond*, 4 B. & C. 246.

(2) *Bradford v. Tappan*, 11 Pick. 79.

(3) *De Foncleare v. Shottenkirk*, 3 John. 170.

(4) *Higgins v. Chessman*, 9 Pick. 10.

(5) 2 Mann. & Ry. 566.

(6) *Dixon v. Yates*, 5 Barn. & Ad. 340.

(7) *Ward v. Shaw*, 7 Wend. 406.

(8) *Phillips v. Hunnewell*, 4 Greenl. 379.

8. If a horse is bought in a market, for which the vendee is to pay £10, if the ready money be not paid, the property is not altered, but the party may sell him to another.(1)

9. A bill of lading is not necessary as the means for the owner of goods to convey his interest therein.(2)

10. Personal estate may be transferred without deed, and when a deed or bill of sale becomes necessary or proper, or is adopted as the most convenient mode of transfer; it is to be literally construed, to effect the intention; and not rigidly by the precise rules relating to real estate.*(3)

11. A certificate from one person to another that he has purchased property from the latter, is not conclusive evidence of a sale which actually passes the title, if it was understood at the time that a bill of sale be given afterwards. In this case, a bill of sale was afterwards applied for by the vendee, and upon payment of the price, the vendor gave his note for the amount.(4)

12. A broker altered the invoice of goods sold, from one person to another, and sent it to the latter, advising him that for the sake of simplicity he had made this change. Held, the invoice constituted a contract of sale.(5)

13. An agreement between merchants, that one of them shall take a share in the outfit of a ship and the adventure, is not an agreement for *the sale of goods*, within the stamp act.(6)

14. If I sell a horse for money, I may keep him till paid; but can have no action of debt till he is delivered. But *the property passes* by the bargain. If the purchaser presently ten-

(1) *Mires v. Solebay*, 2 Mod. 243.

(2) *Meyer v. Sharpe*, 5 Taunt. 80.

(3) *Stockbridge v. W. Stockbridge*, 14 Mass. 257. *Hastings v. Blue Hill, &c.*, 9 Pick. 82.

(4) *Higgins v. Chessman*, 9 Pick. 7.

(5) *Pauli v. Simes*, 6 C. & P. 506.

(6) *Leigh v. Banner*, 1 Esp. 403.

* In Massachusetts, before the revolution, a slave, being a personal chattel, would pass without bill of sale or other formal instrument. *Milford v. Bellingham*, 16 Mass. 108.

der the money and I refuse it, he may take the horse or have an action of detainment. If the horse die in my stable, between the bargain and delivery, an action of debt lies, because the property was changed by the bargain.(1)

15. The mere circumstance of payment in advance does not pass a title to the vendee, though followed by delivery, if the circumstances indicate a contrary intention.

16. A agreed with the war department to build a fort; advances to be made in part payment for materials, delivered with an invoice at the fort, and approved by the engineer, and, at the end of each month, for the work done also. Held, such advances did not constitute a purchase of the materials delivered, so as to vest a property in them in the United States.(2)

17. Though, by the terms of an agreement, payment is to be made *in futuro*, and to precede delivery: yet the right of property will pass to the vendee, if such appear to be the intention of the parties.

18. January 4, A agreed to sell B, and B agreed to buy of A, a stack of hay, for a certain sum of money; to be paid for on February 4, and allowed to stand on the premises of A till May 1. B agreed that the hay should not be cut till paid for. Before it was taken by B, the hay was destroyed by fire. Held, the above agreement constituted an immediate sale, and passed the right of property to B, though A still retained the right of possession. The provisions for payment at a future day, and that payment should precede delivery, did not vary this construction of the contract, if the parties intended that the vendee should immediately have a property in the goods, and the vendor in the price. Nothing remained to be done by the vendor, as between him and the vendee. Upon these grounds, held, that the vendee, having given a bill of exchange for the price, which he afterwards paid, might recover the amount in an action for money paid from the vendor.(3)

(1) Noy, 88.

(2) U. S. v. Tillotson, Paine, 305.

(3) Tarling v. Baxter, 6 B. & C. 360.

19 So where an article ordered to be made is finished and paid for, and the vendee does acts which indicate that he considers himself as the owner; a property passes, notwithstanding orders from him for an alteration, which are not complied with.

20. The plaintiff had a chariot built to his order, and paid for it, and it was finished. The plaintiff then ordered an additional front seat. The builder having delayed to make it, the plaintiff repeatedly sent for the chariot, and the builder promised to deliver it. The plaintiff, being dissatisfied, ordered that the chariot should be sold. The additional seat had not been made, as ordered. While the chariot stood in the builder's warehouse for sale, according to usage, he became bankrupt. The plaintiff brings trover against his assignee for the chariot. Held, the action would lie. Both parties had treated the article as finished; the whole price was paid; and the plaintiff had often sent for it. The order for an additional seat made no difference in the case, nor was the chariot "in the order and disposition of the bankrupt, with the consent of the true owner," so as to pass to his assignee. The article was in *existence* on payment of the price; and therefore the property passed.(1)

21. After an executed sale, the vendor can maintain no action for the goods, even for the vendee's benefit, and though the latter has never had possession.

22. A assigns all his interest in a crop growing upon land of B, to C. Held, this operated a complete transfer of the property, and that for an injury done to it, C must bring an action in his own name. The suit was brought in the name of A, and alleged an injury to C as his assignee. But there was no necessity for suing in A's name, and he, having parted with all his interest, could not maintain the action for his own benefit.(2)

23. After a sale to one person, the goods may be re-sold to another by the vendor, with the consent of the first purchas-

(1) Carruthers v. Payne, 5 Bing. 270.

(2) Carter v. Jarvis, 9 John. 143. 2 Pirt. Dig. 355.

er; and the latter vendee will then be alone liable to the vendor for the price.

24. A sold goods to B, and B, being unable to pay for them, transferred them to C, and C promised A to pay him. Held, this was a new sale of the goods to C, not a mere agreement to pay B's debt. A could have maintained no action against B.(1)

25. An order for several articles at the same time, though at distinct prices, is one order. Hence, the vendee is not bound to accept one article, unless all the rest are furnished. But if he does accept and offer payment for one, he is bound to pay for all that are supplied. So where three parcels of goods are ordered, and only one sent, but this is accepted; the vendee will be bound to receive and pay for the second, though sent without the third. But where different parcels of one quantity of goods are to be delivered at different times; though one parcel be delivered and accepted, the vendor cannot sue for the price before the time appointed for delivery of the remainder; because if not delivered, the vendee may return the parcel which he received. But unless he does return it, the vendor may sue for the value, though not the contract price, of the part accepted, after the time appointed for delivery of the whole. But he will be liable to an action by the vendee for breach of contract. If from the terms of the contract it may be implied, that each parcel of the property sold is to be paid for on delivery, an action for the price may be maintained accordingly. Thus where one contracts for certain numbers of a periodical publication, to be delivered as published, at so much per number, it seems, he is liable to pay for the numbers delivered, before delivery of the whole.(2)

26. Where a specific chattel is sold and the price paid, since, as has been already stated, the property vests in the vendee, if

(1) *Browning v. Stallard*, 5 Taun. 450.

(2) *Baldey v. Parker*, 2 B. & C. 37. *Champion v. Short*, 1 Camp. 53, see 55 Ib. n. *Waddington v. Oliver*, 2 N. R. 61. *Walker v. Dixon*, 2 Stark. 281. *Shipton v. Casson*, 5 B. & C. 378. *Oxendale v. Wetherell*, 9. 386. *Withers v. Reynolds*, 2 B. & Ad. 882. *Mavor v. Payne*, 3 Bing. 286, 6 Moo. 114.

the article be left with the vendor, the latter is not liable for any loss or deterioration, unless guilty of gross negligence.(1)

27. A agreed to sell to B a quantity of beef; and soon afterwards gave him a bill of parcels, and received payment; with the agreement that the property should remain in the hands of A, till forwarded to New York. Seven or eight months afterwards, B received a portion of the beef, which was of bad quality, and the whole upon inspection was found unmerchantable. In an action brought by B for non-delivery of good and merchantable beef, held, a title passed to B upon payment, and the action could not be sustained.(2)

28. An order for goods, found in the hands of the drawee, is *prima facie* evidence of a sale to the drawer, and a delivery at his request. It is otherwise with orders for the payment of money. These are presumed to be drawn upon funds in the drawee's hands, who therefore can maintain no action against the drawer, unless he offers evidence to rebut this presumption.(3)

29. Where a vendor draws an order upon the depository of the goods, who accepts it; this is a sale according to the terms of such order. And an order of this kind is presumed to be for value, though not expressed or proved as being *for value received*, especially if it is accepted. The party receiving the order is presumed to have a beneficial interest in the property, and to be something more than a mere agent. A parol acceptance of the order is binding upon the depository; and an indorsement and delivery of it with intent to assign, constitutes an assignment. If the order has been accepted, such indorsement and delivery constitute a sale, which is sufficient consideration for a promise by the vendee.

30. An *exchange* of chattels is subject to substantially the same rules as a sale. The difference between these two transactions

(1) *Lansing v. Turner*, 2 John. 13. Inst. 1. 24. 3 Lit. Sel. Cas. 217. 4 Bibb. 66.

(2) *Lansing v. Turner*, 2 John. 13.

(3) *Alvord v. Baker*, 9 Wend. 323.

(4) *Bailey v. Johnson*, 9 Cow. 115.

is this, that the one is a transfer *for money*, the other *for goods*, by way of barter.(1)

31. In case of an exchange of property, unless there is fraud, the same formalities are requisite to effect a re-exchange, which were required in the original transaction. Thus, the plaintiff contracted with A, to exchange soap belonging to the plaintiff for a quantity of wine belonging to A. The soap was delivered. The wine was in the hands of the custom-house officer. Being of bad quality, it was marked as *Fayal* wine, though really *Madeira*. The plaintiff being dissatisfied because it was thus marked and therefore not subject to debenture, the parties submitted the matter to arbitrators, who awarded, that as the wine still remained in the custom-house, it should continue to be the property of A, and the soap be returned or paid for at the market price, to which award both the plaintiff and A gave their assent. No fraud was charged upon either party. The soap being attached as belonging to A, held, the plaintiff could not maintain an action against the officer, there having been no effectual re-exchange, and A having elected, by not returning the soap, to keep and pay for it.(2)

32. The law implies a contract to pay for goods, from their having belonged to the plaintiff, and coming to the possession of the defendant, if unaccounted for.(3)

33. A fraudulently persuades B to sell goods to C, an insolvent person, and himself obtains possession of them. Held, B might maintain *indebitatus assumpsit* against A for the price. A cannot set up in defence the sale to C, because procured by his own fraud, and independently of this, mere possession of the property raises an implied promise to pay for it.(4)

34. Whether a contract for sale has been completed, is a question for the jury. The Court will not order a nonsuit for want of full proof of the contract.(5)

(1) *Denn v. Diamond*, 4 B. & C. 246.

(2) *Quincy v. Tilton*, 5 Greenl. 277.

(3) *Hill v. Perrott*, 3 Taun. 274.

(4) *Ib.*

(5) *De Ridder v. McKnight*, 13 John. 294.

35. If a tradesman finish goods according to the order of one person, and sell them to another, and the former has other articles made for him within the stipulated time; he cannot maintain *trover* against the latter for those first manufactured.(1)

36. A transaction, which is in effect a mere exchange of securities between two parties, though connected with the furnishing of goods by one for the other's benefit, cannot be treated as a sale, so as absolutely to charge the latter as vendee of the goods. Thus, A delivered to B, a ship-master and joint owner with C, a quantity of wheat to be carried to New York and there sold. It was agreed between A and C, that B should appropriate the proceeds to the use of C in New York, who was to pay A the amount received by B. That is, if B sold on credit, taking notes in payment, C was to give corresponding notes to A; if for cash, then C was to pay cash. B sold on credit, according to the usual course of trade, to D, taking his note at ninety days; and C gave a similar note to A, upon which A brings the present action. Before the expiration of the ninety days, D had become insolvent. Held, the transaction was an exchange of notes for the accommodation of A; that the property had not vested in C, and he was not liable to the present suit.(2)

37. No action lies for the price of goods sold, where there is a material deviation by the vendor from the terms of sale, and a refusal by the vendee to receive the property.

38. A, residing at Albany, ordered certain goods from B at New York. A portion of them were sent, but on a different credit from that stated in the order. The vessel was wrecked, and a part of the cargo lost. A refused to receive the remainder, and immediately notified B that he did not consider the goods as belonging to him, on account of the above deviation from the order. Held, he was not liable for the price, the facts showing neither an express nor implied assumpsit.(3)

39. In addition to the transfer by sale and purchase, which is

(1) *Mucklow v. Mangles*, 1 Taun. 318. (See *Woods v. Russell*, 5 B. & A. 942.)

(2) *Herring v. Marvin*, 5 John. 333.

(3) *Bruce v. Pearson*, 3 John. 534.

the act of parties, a title to personal property may pass by act of law, or by recovery of damages in trover, trespass, book-debt or assumpsit.(1)

40. Where one is sued in trover, a mere default has not the effect of transferring the title of the goods to him. There must be a judgment; because, in the former case, judgment might be arrested or the default taken off.(2)

41. The title to a chattel is transferred by operation of law, only when the damages recovered by the former owner, in a suit against one who has wrongfully interfered with it, include the value of such chattel. Thus the plaintiff brings trespass *qu. claus.* for cutting and carrying away his timber, and in this suit attaches the timber, and takes possession of it as reclaimed. The defendant confesses the trespass, and the plaintiff formally abandons so much of the suit as concerns the asportation of the timber, and proceeds for the breaking of the close and prostrating the trees, for which he recovers nominal damages. Held, the judgment in this suit did not vest the property of the timber in the defendant. The plaintiff was not estopped by his attachment of the timber, to deny that it belonged to the defendant; for such attachment might be founded on erroneous information. Nor was the return of the officer conclusive upon the same point. It is a common case, for an officer to return an attachment, and afterwards to justify himself for not seizing the property on execution, by showing that it did not in fact belong to the debtor. Moreover, the officer's return must be taken in connection with the other parts of the same record, including the judgment; which show conclusively that the title had not vested in the defendant.(3)

42. The question has sometimes arisen, whether it is necessary to the validity of a sale, that the thing sold should be in existence at the time, or whether, if sold in expectation of its future existence, or under a contract to manufacture it, a title

(1) *Canaan v. Greenwoods*, 1 Conn. 7.

(2) *Carlisle v. Burley*, 3 Greenl. 250.

(3) *Loomis v. Green*, 7 Greenl. 386.

will vest in the vendee, whenever the article is brought into being.*

43. It is said to be now well settled, that a possibility coupled with an interest, is assignable; that a man may grant that which he hath *potentially*, though not *actually*. As if a person grants all the tithe wool which he shall have such a year, the grant is good in its creation, though it may happen that he shall have no tithe wool in that year.(1)

44. In principle, there seems to be no distinction, with reference to the point now under consideration, between sales of *chattels in possession*, and assignments of *choses in action*; and the latter have been often held assignable, though consisting in future and contingent debts. Thus, it is said, a contingent debt may be assigned in Equity, and when the contingency happens, the debtor is liable to the assignee. So, where the master of a vessel drew a bill upon a consignee of goods, for the money that might be due to the former for freight on delivery of the goods; held, this was an assignment of the demand for freight when it should accrue.(2)

45. Where it is agreed between two parties, that one shall do a certain piece of work for the other, the foundation or *substratum* of which, being in existence at the time, is conveyed to the latter; all materials subsequently affixed will become his property, by *accession*. Thus if the keel of a ship is conveyed, in connection with a contract by the vendor to finish it for the vendee, every stick of timber that goes into the vessel becomes the vendee's property. It is the rule of the civil law, "*proprietas totius navis carinæ causam sequitur.*" The same principle would apply to an unfinished house, sold by the builder, and subsequently completed by him.(3) (See Sect. VI. 6.)

(1) *Bigelow v. Willson*, 1 Pick. 493. *Hob.* 132. 2 *Rolle*, 47, 8, see 5 Pick. 522. 6. 209. 1 *Cov. & Hughes*, 345 (4). *Walker v. Russell*, 17 Pick. 280. 11 *Mass.* 157, n.

(2) *Crocker v. Whitney*, 10 *Mass.* 316. *Cutts v. Perkins*, 12. 206.

(3) *Glover v. Austin*, 6 Pick. 220.

* By the civil law, it seems such sale is valid, as, for instance, of future fruits or a future draught of fishes. *Domat*

46. The following case was decided in North Carolina. Agreement to deliver the plaintiff the first colt which should be foaled by the defendant's mare. Held, a title to the colt hereby vested in the plaintiff.(1) So, in Tennessee, the owner of a mare during gestation may sell her future offspring, the property to vest in possession whenever such offspring shall be born. In general, no right can be communicated, to property of which the bargainor has no title in possession, actually or potentially. But the case above-mentioned does not fall within this principle. It is like that of a growing fleece, a crop of fruit or grain. Hence where A agrees with B that the foal of his (A's) mare shall belong to C, and after the colt is born conveys it to D, C may maintain trover against D.(2)

47. In the foregoing section, it has not been considered what communications between two parties are necessary to constitute a *contract*, in distinction from a mere *offer* or *proposal*, to sell or buy; because this point has no exclusive reference to contracts of sale. It seems not inappropriate, however, to state here the general principles on this important subject.

48. Where there is a written offer to sell, an acceptance consummates the agreement, if the offer is still standing. And it is presumed to be so until the time fixed, or, if none were appointed, till it is expressly revoked or countervailed by a contrary presumption. If the other party agrees to decide whether he will accept the offer, upon the happening of a certain event, no bargain arises till such decision, though the event have happened. There is a binding agreement, when the minds of two persons meet, as signified by acts, although both do not know of such concurrence at the time. A bargain is closed, where nothing mutual remains to be done, to give either party a right to have it effected. Until both parties are agreed, either may withdraw an offer which he has made. But where A offers to sell goods to B, receiving an answer by return of mail; but, by A's misdirecting the letter, B does not immediately receive it,

(1) Fonville v. Casey, 1 Murphy, 389.

(2) M'Carty v. Blevins, 5 Yerg. 195.

and sends an answer by the first mail, accepting the proposal, which reaches A two days later than he expected; A is bound by the contract. He must be considered in law as making, during every instant his letter was travelling, the same offer to B, and B's acceptance completed the contract.(1)

49. But, in the following case, a different decision was made. A offered to buy of B a certain number of barrels of flour, to be delivered at Georgetown by the first water, and to pay a certain price for them. He also demanded an answer by the return of the wagon which carried the letter. 'This wagon was in use by B to carry flour from his mill to Harper's ferry, near which A then was. B signified his acceptance of the proposition by the first regular mail to Georgetown, where the letter was received by A, but no letter was sent to Harper's Ferry. Held, A was not bound.(2)

SECTION II.—PAYMENT OF EARNEST.

1. Judge Swift remarks, that payment of *earnest* does not change the property of the thing sold, but merely binds the bargain, and gives the vendee a right to demand the thing.* But the same author elsewhere says, if A sell B a horse for £10, and B pay earnest, or sign a note of the bargain, and the horse die in the vendor's custody before payment, still he is entitled to it (payment,) because, by the contract the property vested in the vendee. If a day of payment is given, payment of earnest has no operation, because the bargain is complete without it.(3)

(1) *Mactier v. Frith*, 6 Wend. 103. *Adams v. Lindsell*, 1 B. & A. 681. 3 M. & R. 97. 4 Bing. 661.

(2) *Eliason v. Henshaw*, 4 Wheat. 225.

(3) 1 Swift's Dig. 377. *Ib.* 380.

* It seems, the payment of *earnest* binds only *the bargain*, not *the property*. It gives the vendee a right to demand the article, but such demand, without payment of the whole price, is void. 1 Salk. 113.

2. After the payment of *earnest*, the vendor cannot re-sell the property without default of the vendee. If the latter does not come and pay for and remove the article, the vendor should request him to do so. If he still neglects to do it in convenient time, the agreement is dissolved, and the vendor may re-sell.(1)

SECTION III.—WHETHER A CONTRACT IS *a sale* OR *a bailment*.

1. The important question often arises, whether a transfer of personal property constitutes *a sale* or *a bailment*; that is, whether it passes an absolute title to the person receiving the property, leaving in the former owner only a claim for the value or agreed price, or a mere temporary and qualified interest, subject to a reversionary claim on the part of the vendor. It will be seen by the cases cited, that a transaction which was originally a bailment, may by some subsequent act or omission of the bailee, become a sale.

2. A put into the hands of the defendant a carriage, for the purpose of paying debts due to him and the plaintiff. The defendant kept the carriage more than a year, repaired it on his own account, the plaintiff refusing to join in the expense, used it as his own, and never sold it, although he twice offered it for sale. The carriage was sufficient in value to pay both debts. Held, the defendant was liable to the plaintiff as purchaser of the carriage. He had a reasonable time to effect a sale, and should have sold at auction, if he could not privately. His offers to sell might have been merely collusive.(2)

3. The plaintiff delivered a quantity of wheat to the defendant at the mill of the latter, to be exchanged for flour; and the defendant put the wheat into his own common stock. The mill being afterwards burnt, the defendant refused to deliver the

(1) 7 E. 571.

(2) Norton v. Squire, 16 John. 225.

flour, and the plaintiff brings *assumpsit* against him. Held, the transaction was not a bailment, but a sale, and the defendant therefore liable to this action.(1)

4. B delivered to A six cows, under the verbal agreement that they should be returned after two years, or the value then paid, unless A should be dissatisfied with an exchange of land made at the same time between the parties; in which case, the cows were to be the property of A forever. The two years having expired, A expressed himself as satisfied with the exchange, but refused to deliver or pay for the cows. B brings *assumpsit* against A, declaring upon a *quantum meruit*. Held, the transaction was a sale, not a bailment; that it was not within the Statute of Frauds, though verbal and in part to be performed, so far as related to payment, after a year, it being partly executed by delivery; and that even if within the statute, the plaintiff might recover upon a *quan. mer.*(2)

5. The defendant received from the plaintiff a quantity of leather, and gave him therefor the following receipt—"received the following leather, viz., &c., which I agree to pay for as follows; one shilling deduction to be made on each side of upper leather from the price above, and two shillings per pound from the sole leather, with the privilege of returning any quantity of said leather, remaining on hand at settlement." Held, this was a sale, not a delivery upon commission; that parol evidence was inadmissible to control the terms of the receipt; and that a loss of the leather by fire must be borne by the defendant. The privilege of returning such part as remained unsold, was a provision for the benefit of the defendant as to the mode of payment. Had the delivery been on commission, there would have been some provision as to compensation or rate of commission. But the deduction mentioned in the receipt did not admit this construction. The defendant agreed to pay for the leather at a certain rate; hence the transaction could not be a bailment. The deduction was to be in *the price*.(3)

(1) *Ewing v. French*, 1 Blac. 354.

(2) *Holbrook v. Armstrong*, 1 Fairf. 31.

(3) *Marsh v. Wickham*, 14 John. 167.

6. Declaration in general assumpsit for goods sold and delivered. The evidence showed a consignment for the purpose of sale, and a sale of a portion of the property. Held, this was a special bailment, and the action did not lie.(1)

7. A bill of sale authorized the vendee to take possession of the property at pleasure, and account for it to the owner at the auction price. Held, the vendee was accountable only for that portion of the property which he took, and not even for this, unless his conduct discovered an intention to make it his property, or gross negligence, sufficient to render him accountable.(2)

8. Contracts of *sale or return*, or by which the article is to be returned unless sold, seem to occupy an intermediate ground between a sale and a bailment. Such contracts have been adjudged legally valid.(3)

9. By a written contract between A and B, A was to furnish B from time to time with goods, to be sold for cash, lumber, country produce, &c.; but not otherwise. The goods or the proceeds of them to be held by B as A's property, the former to be charged to B on the books of A, and all the articles received in exchange credited, and the business to be carried on in B's name. No provision was made for compensation to B. The word *agent* appeared on B's sign, and his agency was well known. The goods in possession of B having been attached by a creditor of B, whose demand accrued before they came into his hands, and the jury having negatived fraud, held, A should have judgment against the attaching officer. The rule,* that delivery of goods, to be returned or something instead of them at the option of the receiver, constitutes a sale, was held not to apply to factors and agents. The case might have been different, had the vendee originally owned the goods and sold them to the vendor.(4)

(1) *Colman v. Price*, 1 Blac. 303.

(2) *Durkee v. Leland*, 4 Verm. 612.

(3) *Meldrum v. Snow*, 9 Pick. 444.

(4) *Blood v. Palmer*, 2 Fairf. 414.

* Recognized in *Hurd v. West*, 7 Cow. 752, *Jones*, 102.

SECTION IV.—CONDITIONAL SALE.

1. A contract or sale of a chattel personal, as an ox or the like, may be upon condition, and the condition doth always attend and wait upon the estate or thing whereunto annexed; so that though the same do pass through the hands of a hundred men, it is still subject to the condition.*(1)

2. If the vendor trusts to the vendee's promise to perform the conditions of sale, and delivers the property, the title passes. But if performance and delivery are understood to be simultaneous, possession obtained by artifice and deceit does not pass a title.(2) (See *Delivery*.)

3. A bill of sale apparently absolute may be proved to be conditional by parol evidence offered by both parties.(3)

4. It is sometimes a material question, whether a condition annexed to an absolute sale constitutes a mortgage, or merely gives to the vendor the right of re-purchasing the property on certain terms.

5. To an absolute bill of sale signed by the vendor was attached a condition signed by the vendee, as follows—"the condition of the above obligation is such, that if A pays B the above sum, &c. by Jan. 1, 1827, &c." Held, this was not a mortgage, but a sale with liberty to re-purchase, and that the word *pay* in the condition did not constitute a covenant by the vendee to pay. To constitute a deed a mortgage upon its face, it must show the consideration to be either a debt due, or money

(1) Shep. Touch. 118, 19, 20.

(2) Harris v. Smith, 3 S. & R. 20.

(3) Smith v. Tilton, 1 Fairf. 350.

* In Pennsylvania it is held, that if possession of goods be delivered to the vendee, but not to become his property till payment of the whole price, the agreement is void against creditors of the vendee, whether they trusted him on the strength of the goods or not. *Martin v. Mathiott*, 14 S. & R. 214. But see 9 Greenl. 47. 6 Har. & J. 153.

lent at the time, or else must contain a covenant to pay. The intention of the parties at the time changes a deed into a mortgage; and this may be shown by parol evidence.(1)

6. A, having the right to re-purchase certain property from B, made application to C to take an assignment of the condition, pay the money, and receive a conveyance of the property as security, to which C assented. A and C went to B at the day, and C tendered the money and requested a conveyance to himself. B refused to make such conveyance, but offered to receive the money and convey to A, which proposal C declined accepting. Held, these facts showed no performance by A, and B was not bound to convey to any one but him.(2)

7. The following cases furnish miscellaneous examples of conditional sale.

8. By a written agreement between A and B, the former was to give the latter three horses and the gear belonging to them for \$200; in consideration of which, B agreed to work out the amount by carting at seventy cents per thousand, till the property was paid for. A to pay B one half the amount earned by B for carting during the season, till the property should be paid for. The horses, &c. to remain the property of A, till worked out or paid, any agreement to the contrary notwithstanding. B to attend to the carting and furnishing carts necessary for delivering brick to buildings and wood to kiln, at the above price, to the brick-yard. At the end of the season—January 1, 1836—whichever party is in debt upon settlement, to be paid in cash. If B refused to cart when called on, the horses, &c. to be returned, and the agreement void, and B to forfeit the balance of cash remaining with A as collateral. Held, only the right of possession passed to B, till payment of \$200 by carting; and this right re-vested in A, whenever B refused to pay the price agreed on; that B, after paying by his labor for the horses, &c. could in no event forfeit them. If, before such payment, he refused to cart for A, he was to lose the possession, and forfeit what he had paid.(3)

(1) *Hickman v. Cantrell*, 9 Yerg. 172.

(2) *Ib.*

(3) *Huhn v. Long*, 2 Whart. 200.

9. A agreed to cut all the timber from B's land, and carry it to B's mill, to be sawed into boards; A to have a certain portion of the boards, but B to remain the owner till certain debts of A were paid, and the whole agreement fulfilled. Held, this was a valid contract, and the sale of a part of the logs, after being taken from the land, to one having notice of its terms, passed no title as against B.(1)

10. A town in Massachusetts, by virtue of St. 1818, ch. 106, sold to one A the right of fishing in a certain river, upon condition that they should sell no further right. The town afterwards sold another right of fishing to B, upon condition to be void, if the town could not lawfully make such sale. A refused to accept and pay for the privilege sold to him, but united with B in carrying on the fishery under B's right. Held, although the sale to B was void, the town could not maintain an action against A for the price which he agreed to pay. The condition in the conveyance to A was intended for his benefit. The town, having pretended to convey the privilege to B, were estopped to deny their power so to do.(2)

11. A delivered to B a quantity of wool, taking the following receipt, "Received, &c. wool to manufacture into cloth, &c., the wool to be reckoned at seventy-five cents per pound, amounting, &c., which amount I agree to pay in six months. The wool, before being manufactured, after being manufactured, or in any stage of manufacturing, to be the property of A, till the above amount is paid." The transaction was proved to be *bona fide*. Wool received into the manufactory from different persons was usually kept distinct, while in the process of manufacture. Held, that payment by B was a condition precedent to his becoming owner of the wool, even with regard to his creditors. There was no fraud against creditors; none was intended, nor was there any concert or deception. The creditors of B had no reason to suppose him the owner of the property, unless they were notified of the above transfer; and in that case, they must also have been acquainted with the particular terms of it.(3)

(1) Waterston v. Getchell, 5 Greenl. 435.

(2) Taunton v. Caswell, 4 Pick. 275.

(3) Barrett v. Pritchard, 2 Pick. 512. Ayer v. Bartlett, 9 Pick. 156.

12. A purchased from B a cow, on condition that if A should pay for her, she should become his property, otherwise to remain the property of B. A took possession of the cow, used her three or four years, and paid a part of the price, which B accepted; but he neglected to pay the residue, though requested. The son of B, by his order, took possession of the cow, and A brings trespass against him. Held, the property had not vested in A, and the action did not lie.(1)

13. A agreed to pay for certain hay, if B should pronounce it merchantable. B said of the hay that it was "a fair lot, say merchantable—not quite so good as I expected—the outside of the bundle some damaged by the weather." Held, this did not bind A to take the hay.(2)

14. A sold a quantity of wines to C, as the agent of B & Co., giving him the following writing—"sold C 20 pipes wine at \$1 per gall. at 6 months, payable in P., or, if his principal prefers cash, 3 per cent. discount; the acceptance to be perfectly satisfactory. Principal B & Co." Upon the importunity of C, the wine was delivered on this express condition, and C agreed that B & Co. should comply with the conditions. The contract was not fulfilled. B & Co. sold to the defendant and became insolvent. C, who had pledged himself for the fulfilment of the contract by B & Co., paid the sum due A, and took a bill of sale. C brings replevin for the property. Held, the sale was conditional, and B & Co. gained no title till payment and delivery, or till satisfactory paper was given.(3)

15. A sold to B a quantity of coffee, "provided it is not sold in New York." Held, the sale was absolute, unless the coffee was *then* sold. The proviso did not apply to future sales.(4)

16. A, residing at Naples, sent an order to B at Birmingham to forward to him certain goods, upon insurance being effected on them, with three months' credit from the time of arrival. B marked A's initials upon the goods, sent them by canal to Liverpool, and effected insurance upon them as the property of A.

(1) West v. Bolton, 4 Verm. 558.

(2) Crane v. Roberts, 5 Greenl. 419.

(3) Copland v. Bosquet, 4 Wash. C. C. 588.

(4) Blydenburg v. Welsh, Bald. 331.

At Liverpool, the agent of A delivered the goods to the owner of a ship bound to Naples. By the negligence of the ship-owner they were damaged, and A brings an action against him upon this ground. Held, the action was rightly brought. The goods became the property of A, when sent from Birmingham, and their arrival at Naples was not a condition precedent of payment. If it were, the insurance would have been useless. The true construction of the order was, that if the goods should reach Naples, A should have three months' credit from their arrival. If not, for a reasonable time after their arrival at Naples became impossible. Unless the goods belonged to A, no suit would lie upon the policy. B could not maintain one, because they were represented as A's property. Nor was A's agent alone entitled to bring an action, because the goods were receipted for to him by the defendant; for this created a liability in law to the principal: although some difficulty might have arisen on this point, had the agent himself set up an adverse interest. (1)

17. Agreement as follows. "I have this day sold *on arrival*, one hundred tons barilla in your Bon Fin from Teneriffe." By accident, and without fraud or fault of the vendor, the ship arrived without the barilla. Held this was a conditional contract, and the condition on which it was to bind had failed. If the vendor had been guilty of any fraud, an action on the case would lie against him. (2)

18. Agreement to deliver certain goods upon their arrival, to be delivered with all convenient speed, but not to exceed a given day. Held, their arrival in time for delivery on that day was a condition precedent of the contract; and that if they did not thus arrive, without any fault on the part of the vendor, the contract was void, and no action would lie against him for non-delivery. (3)

19. It is not clear that a *mortgage* of chattels is a *contract of sale* under the Statute of Frauds. This contemplates a sale, where the vendor is to receive payment of the price, and the

(1) *Fragano v. Long*, 4 B. & C. 219.

(2) *Hawes v. Humble*, 2 Camp. 327, n.

(3) *Alewyn v. Pryor*, Ryan & M. 406.

vendee to take the goods, neither of which occurs in case of mortgage.(1)

20. A mortgage of chattels may be valid, without any schedule, or enumeration and valuation of the goods, if they are sufficiently indicated, and there is no fraud.(2)

SECTION V.—EFFECT OF A SALE BY ONE NOT OWNING THE
PROPERTY SOLD.

1. By the English law, a vendee of personal property may under certain circumstances gain a better title to it, than the party had of whom he bought. This is where sales are made publicly and with notoriety, or in *market overt*. Such sales are good, not only between the parties, but as to all other persons. A sale in *market overt* must take place on a day and at a place assigned or set apart by charter or prescription for the market, in the day time, between sunrise and sunset, and be made wholly in the market, and not merely begin or end there. These precise requisitions, however, are of little comparative importance in American law, because the whole doctrine of sale in *market overt* is in the United States obsolete, and the universal maxim of our jurisprudence is “*nemo in alium potest transferre plus juris quam ipse habet.*” The owner of property can be divested of it, only by his own consent or by operation of law,(3) unless, perhaps, where one is allowed by the owner to have possession of the thing and of the *indicia* documents relating to it.(4)

2. The following, though more curious than practically useful, may be given as some of the points settled in England in relation to sales in *market overt*.

3. *Sale in market overt* is no plea to an action of trover, because it amounts but to the general issue.(5)

(1) Gleason v. Drew, 9 Greenl. 82.

(2) Brinley v. Spring, 7 Greenl. 241.

(3) Per Savage, Ch. J., Williams v. Merle, 11 Wend. 81.

(4) Chit. on Contr. 304.

(5) Johnes v. Williams, Cro. Jac. 165.

4. In pleading a sale in *market overt*, it need not be alleged that the market was in any certain person, or that it was not held on a Sunday—the prescription being, to hold a fair there every year *upon the 29th of August*; or that any *toll* was paid, or that the seller had a property in the goods.(1)

5. A fair holden upon the Sunday is well enough, although by 27 Hen. 6, c. 5, there is a penalty inflicted upon one who sells on that day; but it makes a sale not void.(2)

6. Stolen goods were sold in the public market-place in Boston. Held, that no title passed to the vendee, notwithstanding an ancient ordinance of 1633, which provided that “henceforth a market shall be kept at Boston on the fifth day of the week.”(3)

7. So in Maryland, a purchase at a public market established by law, has been held not to be in *market overt*.(4)

8. Goods were sent from Huntingdon to Pittsburgh by a wagoner, to be delivered to A. The wagoner sold them openly in the streets of Pittsburgh to B. Held, the vendee gained no title to the goods. The law of Pennsylvania does not recognize any *market overt*. The owner of the goods was guilty of no imprudence, and held out no false colors. The goods were sent in the usual and notorious course of business from Huntingdon to Pittsburgh, and the wagoner could not be presumed to own or have authority to sell them. The owner might maintain trespass or trover against any one who should take them from the carrier, although the latter might also maintain an action. He had a bare authority to carry, but no interest.*(5)

9. Where the bailee of a chattel sells it, the owner may recover the property or its value from any one in possession of it, even a *bona fide* purchaser without notice. And the principle applies to a broker, though he purchase in the regular course of

(1) *Comyns v. Bayer*, Cro. Eliz. 485.

(2) *Ib.*

(3) *Dame v. Baldwin*, 8 Mass. 518. *Towne v. Collins*, 14 Mass. 500.

(4) *Browning v. Magill*, 2 Har. & J. 308.

(5) *Lecky v. M'Dermott*, 8 S. & R. 500.

* See further as to *market overt*, *Hosack v. Weaver*, 1 Yeates, 478. *Hardy v. Metzgar*, 2. 347. *Easton v. Worthington*, 5 S. & R. 130.

business, and dispose of the property according to the instructions of his principal, before suit brought. The rule of *carcat emptor* is to govern, and the vendee's claim is upon the implied warranty of title by his vendor.(1)

10. The plaintiff delivered a horse to A to be sold for the plaintiff's benefit. A sold to B in payment of a debt of his own, and B to the defendant. Held, the plaintiff still retained his title to the horse, and might maintain replevin against the defendant.(2)

11. The master of a tow-boat took by mistake four barrels of pot ashes from the warehouse of the plaintiff, who occupied the same building with the owners of the boat at Albany. Upon arriving in New York, the master discovered his mistake, and delivered the property to the clerk of his employer's agent, who undertook to carry it to the inspector and advertise it, which was accordingly done. The clerk sold the ashes to the defendant, a produce broker, who purchased on account of one A, for a fair price, and received the inspector's certificate. The defendant took the ashes from the inspector's office and shipped them to the order of his principal. Held, after demand, the plaintiff might maintain trover against the defendant.(3)

12. The principle, that a sale, though made for valuable consideration, and without notice of any adverse claim, passes to the vendee only the title of the vendor; and that the true owner may evict him, is true of a sale *made abroad*, unless there is some local law to the contrary. So where goods are captured, and sold by order of a prize court established by a belligerent in a neutral country; the property does not pass, as against the true owner. And a sale made by a captor, even of the goods of an enemy, does not divest the owner's title, unless there has been a judgment of condemnation by a Court, of competent jurisdiction, of the sovereign of the captor. The maxim of the civil law, "*nemo plus juris in alium transferre potest, quam ipse*

(1) Roland v. Gundy, 5 Ohio, 232. Williams v. Merle, 11 Wend. 80.

(2) Parsons v. Webb, 8 Greenl. 38.

(3) Williams v. Merle, 11 Wend. 80.

habet," makes a part of the law of France, of Scotland, and probably most of the countries of Europe.(1)

13. Where goods are wrecked or abandoned, and sold agreeably to the municipal regulation of the country; the property passes, as against all prior titles. The same rule applies, although before abandonment the property was in possession of pirates, or of captors before adjudication. The regularity and competency of such sale are presumed, where no doubt is raised as to its fairness and official character, because it is a summary proceeding. Foreign courts are bound not only in comity, but by the principles of public utility, to recognize a title thus acquired; for otherwise there would be no security in any derivative titles. Hence, where a ship was brought into a Spanish port, by Frenchmen, in a feeble and dismantled condition, after two months abandoned, several months afterwards cast ashore, and sold at auction by the public agent and commissary of the port; held, the sale passed a good title as against all the world. This is not a case governed by the law of nations, like the questions of prize or capture.(2)

SECTION VI.—CONSTRUCTION OF SALES.

1. With regard to the construction of contracts of sale, one of the most important distinctions is that between *executed* and *executory* agreements.

2. It is a well settled distinction between executory and executed contracts, that the former convey a *chose in action*, the latter a *chose in possession*. The usual and decisive test is, *at whose risk* is the subject of the contract. A mere contract to sell, without actual or symbolical delivery, does not pass a title, but a subsequent sale and delivery has precedence of such contract, and passes the property. The Statute of Frauds proceeds

(1) *Wheelwright v. De Peyster*, 1 John. 471.

(2) *Grant v. M'Lachlin*, 4 John. 34.

upon the above distinction, in requiring written evidence of a mere contract to sell.(1)

3. The word *sold*, at the commencement of a writing signed by a vendor, means, in law, *contracted to sell*.(2)

4. A written agreement stated, that the plaintiff *bought* of one A a quantity of timber lying in Washington and Saratoga counties in the state of New York; the plaintiff to pay for it at the measurement in New York, upon delivery and inspection, and at a fair market price, when delivered. A to deliver the timber by a certain day; the amount to be indorsed upon certain notes held by the plaintiff, and the surplus, if any, paid to A. Held, this was an *executory*, not an *executed* agreement. The timber remained at A's risk. He was to carry it to New York; there was to be no delivery previous to the inspection, and A might refuse to deliver till the indorsement should be made upon the notes as agreed. If the value of the timber exceeded the amount of the notes, A might demand payment of the surplus before delivering the timber. Hence, the plaintiff cannot maintain *trover* against the defendant, a servant of A, who carried the timber to New York, and refused to deliver it to the plaintiff.(3)

5. A writing was given in this form. "H. & A. of P. Dec. 13, 1813. I sold to the above gentlemen 39 bales of upland cotton at 40 cents; 60 days for approved security. S. P. Bill to be made out in the names of H & A, W & B, A T." Held, this was not a sale, but a mere contract to sell.(4)

6. An agreement to sell an unfinished chattel, to be delivered *in futuro*, is in its nature executory, and does not pass a title to the property. Thus in July 1828, A, in consideration of a prior debt, agreed to sell B certain hides and skins then in process of tanning in A's vats, but capable of removal, to be delivered on or before November 12, some of them at fixed prices, the rest at the market price, the value to be passed to the credit of A, in settlement of his account. Held, no immediate title pass-

(1) *Roberts v. Beatty*, 2 Penns. 67. *M'Donald v. Hewett*, 15 John. 351. Per Spencer, J. *Penniman v. Hartshorn*, 13 Mass. 87.

(2) *Russell v. Nicoll*, 3 Wend. 112.

(3) *M'Donald v. Hewett*, 15 John. 349.

(4) *Penniman v. Hartshorn*, 13 Mass. 87.

ed to B, but the property still remained liable to be taken on execution against A, though the transaction was an open one, and though a long-established usage was shown for curriers in the city to purchase leather from tanners in the country, while in process of manufacture, to be delivered when tanned, and to make advances under these circumstances. If the vendor were understood to retain possession as servant of the vendee, the labor and materials to be added by him being the subject of a separate compensation, no purchaser of a finished article would have a secure title. The value of the article in its unfinished state is not to be regarded as the basis of the contract. In the present case, the bargain had reference to the price of the property, when ready for the market. Where an article is manufactured to order, delivery only can pass a title, because at the time of giving the order, there is no property in any thing to pass, and the accidental existence of a part at the time surely would not give a specific right to the whole. The case is unlike that of *growing grain*. This depends upon the process of nature; but the manufacture of hides is a process of art, which changes the quality of the article. The vendee would not be bound to accept them if injured, or manufactured in an unworkmanlike manner; which shows that the title had not vested in him.(1) (See Sect. I. 44.)

7. In the month of November, A agreed to build a ship for B, to find and perform all the carpenter work, and to launch and deliver her in September following; B to pay a certain sum per ton in thirty days from delivery. By another instrument of even date, A leased his ship-yard to B, and covenanted, when the keel should be laid, to give a bill of sale of the vessel, before B should be bound to make any advances. On the same day, B and C entered into an agreement, that the ship should be for their joint account and risk, and that each should bear his proportion of profit and loss. On the 12th of May ensuing, in consideration of advances made by B, and for his security, A conveyed to him all the lumber and materials in the yard, and covenanted to apply them in building the vessel. This instru-

(1) *Pritchett v. Jones*, 4 Rawle, 260.

ment was made before the laying of the keel. May 20, the keel being laid, and the stem and stern-posts raised, A, for the purpose of securing performance of the first contract, conveyed to B "the keel and other parts of an unfinished ship, being the same which was agreed to be built by the instrument of November;" at the same time giving a lease of the yard, and making a symbolical delivery, and a condition being added, that if B fail in his contract, the conveyance should be void, and also a covenant by B that A shall have the right of free entry to the ship-yard, for the purpose of finishing and launching the vessel. The property being attached by creditors of A, B and C bring trespass against the officer. Held, by the contract of November, though designed to give B a lien upon the materials, he would acquire no title till delivery of the vessel in Boston; that probably the agreement of May 12 was equally inoperative, notwithstanding B's prior advances, for it did not appear that the ship had been then commenced, or the materials to be used in the work separated from the rest, without which separation none would pass. But, by the contract of May 20, B acquired a valid title to the property. This was a lawful contract, because it enabled A, without funds, to build the ship with those of B; and the means to effect the object were lawful, being neither imperfect in form, nor fraudulent against creditors. The maxim applied, "*proprietas totius navis carinæ causam sequitur.*" As the facts showed, that the transfer was made merely as security for past and future advances; A's continuing to work upon the ship without any new agreement, was no proof of a covert bargain. The parties considered the original agreement as still in force, but the property was changed for the purpose of security. It was immaterial, whether the transaction constituted a mortgage or conditional sale, or both. The jury found that there was no fraud; nor was the want of any public declaration of the transaction, evidence of fraud. It was further held, that C was rightly joined in the suit as plaintiff. In relation to A, B was to be regarded as sole owner; but, before registration, the title to a ship may pass by parol agreement; and if B, under a

conveyance from A, had claimed the whole title, Equity would have compelled him to assign a portion to C.(1)

8. A agreed with B at Newburyport, to sell him A's "fare of fish" at "12s. 3d. per quintal, and nine cents per quintal for carrying to Boston, wharfage to be paid by B, and all other accidental charges by A; the fish to be at B's risk, when on board the vessel." Held, this contract did not pass a title to B; that before delivery the fish might be attached by creditors of A, and B could not maintain trover against a subsequent purchaser from A. The contract was to be construed as entire for a *sale and delivery* at Boston, not a sale at Newburyport and an independent agreement to carry to Boston. If the latter were the true construction, B would not have agreed to pay wharfage, nor that the fish should be at his risk on board the vessel. A would have the right to retain the property in Boston, till payment. B's assuming the risk, was a mere agreement to insure.(2)

9. A agreed with B, that B should take his sheep and depasture them for a certain time, and if at the end of that time he paid a certain sum, have the sheep for his property. Held, this was no sale, and that A might before the day make a valid sale to C.(3)

10. A gave B a bill of sale of all the lumber and materials in a ship-yard for the purpose of building and finishing a ship, but without any schedule or specification, and not followed by any separation of a particular portion from the whole mass. By a former agreement, A had contracted to build a ship for B. By a subsequent instrument, A conveys to B the keel and other parts of an unfinished ship, then lying on the stocks. Held, that the second instrument passed no property to B; but by the third, he acquired a title to all the timber which had been actually selected and fitted for the ship, provided it could be identified.(4)

(1) Glover v. Austin, 6 Pick. 209.

(2) Shaw v. Nudd, 8 Pick. 9.

(3) Long on Sales, 109.

(4) Glover v. Hunnewell, 6 Pick. 222.

11. A contracts with B to build a ship for him. B, immediately afterwards, agrees with C that he shall own one quarter of her. Held, notwithstanding a subsequent instrument, which transferred to B the materials in A's ship-yard, to be used in building the ship; C had no title to any timber which was not actually put into the vessel.(1)

12. Agreement between A and B for the joint purchase of twenty thousand mats, afterwards to be stored by B. May 6, a new contract was made between them, substantially as follows—"A bought of B twenty thousand Russia mats at ten cents each—\$2000. A to pay \$4 per month storage from this date, and interest on the mats till paid for. A not to pay for the mats more than the amount indorsed on this bill, till the same are sold." Upon this contract, of the same date, was an indorsement of the receipt of \$1,104,50 in cash and notes. May 8, B procured the mats, not paid for, to be attached for one of his creditors. May 13, A was summoned as trustee of B. June 5, A brings an action of trespass against the officer, and recovers judgment for the value of the property, which was paid to A. Immediately afterwards, A was again summoned as trustee of B in the present suit. Held, the sale of May 6 passed a title to A; that the attachment, being tortious, had no effect upon the sale; and that A was chargeable in the first suit for the residue of the mats not paid for, and consequently was not chargeable in the present action. That the mats were not to be paid for till sold by the trustee, made no difference in the case. It was "debitum in præsentibus;" and there was a limitation merely of the time of payment. Nor was it material that the trustee had merely a *constructive* possession, the sale being complete, and the title vested. This fact might be important, if the trustee were attempted to be charged as *holding property in trust*, (as in *Andrews v. Ludlow*, 5 Pick. 28); but the only ground for charging him here must be as a *debtor, for the price*. The attachment could not operate to rescind the sale.(2)

13. A sold to B a boat, B paying part of the price, giving his

(1) *Glover v. Hunnewell*, 6 Pick. 222.

(2) *Stone v. Hodges*, 14 Pick. 81.

note for the balance, and taking a bill of sale. Being unable to pay the note, B gave up the bill of sale to A, who agreed, upon payment of the balance due, to re-convey or restore the boat, and, having no convenient place for keeping it, left it with B, with authority to sell it, subject to the lien of A. Held, the transaction was either a re-sale of the property and payment of the note, with the privilege reserved to B of re-purchasing; or a mortgage to secure the balance due; and that A might maintain replevin against an officer, who attached the boat as the property of B. Under the circumstances, A could no longer have sustained a suit upon the note, although not given up to B. And, on the other hand, if B had converted the boat to his own use, A might bring trover against him. The facts showed a sufficient consideration, not executory but executed, for a re-sale.(1)

14. The defendant contracted with one A to sell him two hundred hogsheads of sugar, which contract A assigned to the plaintiff. The plaintiff inquired of the defendant whether he had in his possession this number of hogsheads, belonging to A, which he would deliver to the plaintiff, and the defendant replied in the affirmative. Payment was made, according to the contract. Held, an action of *trover* did not lie, because the transaction was a mere contract, not an actual sale, and the fifty hogsheads were not *in esse*.(2)

15. The defendant agreed with one A to sell him at so much per ton a pile of slate, to be sold, and paid for, as parcels of it should from time to time be taken away. After paying for fourteen tons, A sold this quantity to the plaintiff, giving him an order therefor upon the defendant. A then made a settlement with the defendant before notice of the transfer, giving his note for the balance due upon the contract, and taking a memorandum, that when paid, the rest of the slate should be delivered. Afterwards the plaintiff presented the order to the defendant, but he refused to accept it. Held, the plaintiff by the above transactions had gained no title to the fourteen tons, and

(1) Gleason v. Drew, 9 Greenl. 79.

(2) Austen v. Craven, 4 Taun. 644.

could not maintain *trover*. The contract between A and the defendant was merely executory, and remained so at the time of the transfer to the plaintiff. It only entitled A to claim that the stipulated quantity of slate should be weighed and separated for his use, but, until this was done, gave him no title. Hence A transferred to the plaintiff a mere *chose in action*, by which transfer the defendant could not be prejudiced without receiving notice. The defendant and A had the right of rescinding their bargain, although A thereby committed a fraud upon the plaintiff. The defendant was entitled to retain the slate as security for the note given him by A. The defendant relied upon the property, and the plaintiff upon the personal security (1)

16. A and B owning a brig and her cargo, which were bound upon a voyage, C advanced to them \$600, and took back an instrument acknowledging receipt of the money, "being the amount of his (C's) adventure on board said brig, to be received from the proceeds of said brig's cargo, whenever her voyage may end," and concluding thus, "we promise to pay C or order his proportion of the proceeds of the cargo, according to said investment of \$600, reckoning the cargo at a fair cash price and the necessary charges, including duties and insurance. In case of loss, the above amount to draw a proportion of the insurance recovered." Invoices and bills of lading were made in the names of A and B. During the absence of the vessel, A and B indorsed the bills of lading, and assigned the cargo, *bona fide*, to E and F, who had signed and indorsed notes for A and B, by way of indemnity for such liabilities, the balance of the proceeds to be paid to the order of the assignors. After the assignment, and before notice of the agreement with C, the assignees accepted an order drawn by the assignor for an amount equal to the whole surplus. E and F having received and sold the cargo, C brings *assumpsit* for money had and received against them. Held, by the contract with C he did not become a part-owner of the cargo, but acquired only a personal claim against A and B; and therefore the action could not be sus-

(1) *Young v. Austin*, 6 Pick. 280.

tained. The property might have been attached by creditors of A and B, and therefore was assignable to one ignorant of C's interest.(1)

17. Contract, in New York, for the sale of five hundred bales of cotton, to be delivered upon its arrival at New York from New Orleans, any time between the date of the contract and the first of June following. Payment in cash on delivery. The cotton to be weighed, and two per cent. tare allowed. Held, this was a mere executory contract, which did not pass the property, and that the proposed vendor was not bound to deliver the cotton, unless it arrived in New York at the time appointed. The specification as to time, merely fixed the period to which the liability of each party was to be limited; but did not constitute an agreement to deliver the cotton at all events. The cotton was to be brought to New York, weighed there, and paid for by the vendee, after making the stipulated deduction. The vendor might retain it for the purpose of weighing, and until it should be paid for. Had the property been lost between New Orleans and New York, or at the latter place before weighing, the vendor must have borne the loss. Upon these grounds, held, *assumpsit* for non-delivery of the cotton did not lie against the vendor.(2)

18. A, the consignee of 20,000 mats, sold them to himself and the plaintiff at ten cents each, upon a credit of six months. Both parties to be equally interested; A to store the mats six months *gratis*; the plaintiff to pay one half the expense of putting them in A's loft; and, as fast as they were re-sold, the proceeds to be paid to A, who was to pay interest for the six months. During this time, some of the mats were sold, and, at the expiration of it, A, to prevent an attachment by his creditors, gave a bill of sale of the whole to the plaintiff, who was ignorant of the fraudulent intent, with the agreement that the plaintiff should pay him storage afterwards, and interest till payment. The plaintiff was not to pay more than \$1,104,50, which was paid in cash and notes, till he should have opportunity to sell, when he was to pay cash for those sold; in the mean time,

(1) *Gallop v. Newman*, 7 Pick. 282.

(2) *Russell v. Nicoll*, 3 Wend. 112.

A to keep possession. The mats having been attached by a creditor of A, the plaintiff brings trespass against the officer. Held, by the first sale, the plaintiff became a tenant in common of the property; that A's possession was his, and the second sale valid without a new delivery; that trespass might be maintained, A's lien, if he had any, not being an attachable interest, and no defence to this suit. By parting with the possession, A lost his lien, and he had no right of action against the officer, because the attachment was made with his procurement.(1)

19. Agreement in writing between A and B, that A should carry on the farm of B, and receive one half the produce in payment for his services. B to furnish all necessary seeds, and A to pay for one half of the seeds sown or return one half of them after harvest, at his option. B to supply A with grain till he could harvest the crops, and to receive the same quantity at harvest, or the value in cash. B accordingly furnished A with rye and oats, a part of which was sown, and the rest used by A; also with a quantity of hay. A raised oats and sold them. B brings *indeb. assump.* against A, the contract still remaining in force. Held, he could not recover for the rye and the first parcel of oats, because these were included in the contract, and A had the right to pay for them in kind. But he might recover for the hay, which was not included in the contract, and for one half the last parcel of oats, because by the sale, A had disabled himself from delivering them in kind.(2)

20. Agreement, made in August, to deliver certain property between October 1, and December 1, to be paid for on delivery at a certain place, with liberty to the vendee to have the quantity increased on reasonable notice. Held, the vendee was bound to give such notice before October 1, and to prove a readiness to pay for the increased quantity.(3)

21. A and B, living in Maine, made a written agreement, by which A was to deliver, and B to receive, at Philadelphia, from one thousand to three thousand bushels of potatoes. Held, A might elect to deliver any quantity between the two quantities

(1) Kittredge v. Sumner, 11 Pick. 50.

(2) Shearer v. Jewett, 14 Pick. 232.

(3) Topping v. Root, 5 Cow. 404.

named, and was not bound to make an election till arrival of the potatoes at the place of delivery, although requested by B to do so after the shipment.(1)

22. The plaintiff, having a quantity of apples, agreed in writing to sell the defendant his cider, at so much per hogshead, to be delivered at T, at a future time; also to lend the defendant his empty casks for the cider, to be manufactured on the plaintiff's premises, and paid for before removal. The plaintiff pounded the apples and delivered the juice to a servant of the defendant, who proceeded to manufacture the cider. Before the process was completed, the cider and casks, some of which belonged to the plaintiff, were seized by the officers of excise, for being in an unentered place, and condemned in the Exchequer as the property of the defendant. In Devonshire, where the parties lived, *cider* was proved to mean the juice of the apples as expressed therefrom. The plaintiff sues for the price of the cider and casks. Held, the true construction of the agreement was for the sale of the juice, not of manufactured cider, and the delivery to the servant of the defendant vested a property in the latter. The defendant was bound by the agreement to enter the premises of the plaintiff. As he neglected to do this, the plaintiff was necessarily prevented, and therefore excused, from delivering cider at T, and he might recover either as for goods sold and delivered, or bargained and sold.(2)

23. A, being the owner of certain land, sold to B by deed all the timber trees standing thereon, allowing him two years for the purpose of taking them away. Held, this was a sale of only so much timber as B might take from the land within the two years, and that a subsequent entry by him was a trespass. It was further held, that the fact of a sale of the land to C nearly four years after the expiration of the period above specified, *reserving the right of B*, gave no new operation to the original contract, nor constituted any new license to B to enter upon the land.(3)

24. A conveyed to B "four clapboard machines and two

(1) *Small v. Quincy*, 4 Greenl. 497.

(2) *Studdy v. Saunders*, 8 D. & R. 403.

(3) *Pease v. Gibson*, 6 Greenl. 81. *Howard v. Lincoln*, 1 Shepl. 122.

shingle machines," then being at a certain place in L; "and likewise the patent right for L and J, during the term of the patent, which is fourteen years from September 3, 1813." Held, this was a conveyance of the patent right to use both the clap-board and shingle machines; that A, having no patent to the former, was bound to refund such part of the consideration as B had paid therefor; and that, inasmuch as no interest had passed in this respect, there was nothing for B to return, in order to maintain an action for the above amount.(1)

25. A contracted with B in writing as follows—"bought the brig T, with stores, boats, and forty tons of iron *kintlage* (a species of ballast) for £1600." Afterwards, a bill of sale was given, as follows—"A, in consideration of £1500, sells the brig T with all her stores, tackle, apparel, &c." Held, the latter writing was decisive as to the contract between the parties; that the *kintlage* was not included in the sale, and that B could maintain no action for non-delivery of it.(2)

26. A sold to B all the hemp that might be shipped in certain vessels at Riga, not exceeding three hundred tons, by C "the agent of the concern." C shipped in these vessels only seventy-one tons on A's account; but more than three hundred tons on account of other persons. Held, the contract must be limited to such hemp as was shipped by C, as the agent of A; and the latter was obligated to deliver no more than the seventy-one tons. It could not be supposed that A meant to sell property which did not belong to him, but to others.(3)

27. Agreement to deliver from seven hundred to one thousand barrels of meal, at so much per barrel. Seven hundred were delivered, and then three hundred more were tendered. Held, the vendor might elect to deliver any number of barrels from seven hundred to one thousand, and that B was bound to pay for those tendered.(4)

28. A agreed to purchase of B "about three hundred quarters, more or less," of foreign rye, shipped in the ship C at

(1) *Judkins v. Earl*, 7 Greenl. 9.

(2) *Lano v. Neale*, 2 Star. 105.

(3) *Hayward v. Scougall*, 2 Camp. 56.

(4) *Disborough v. Neilson*, 3 John. Cas. 81.

Hamburgh, at a certain price, subject to the safe arrival of the C with the goods, and being unsold at Hamburgh. The C arrived, bringing three hundred and fifty quarters of rye ; but B refused to deliver any part of it, unless A would take the whole: A thereupon abandoned the contract, and brought an action to recover the money paid for the three hundred quarters. Held, the agreement did not contemplate an excess of fifty quarters over the three hundred expressly mentioned ; that if the construction of the contract was doubtful, the burden of proof was on the defendant, and the defence not made out. The agreement might mean all the rye that could be brought by the ship C, or all that the correspondent of B could send by her, there being other goods on board ; or the remainder of the cargo, after sale of a part. Whether the terms “ about ” and “ more or less ” could be explained by the testimony of merchants, *qu.*(1)

29. The plaintiff agreed to buy from the defendant, and the defendant to sell the plaintiff, all the *naphtha* that the defendant might make for two years, *say* from one thousand to twelve hundred gallons per month. Upon demurrer to the defendant’s pleas, a question arose as to the sufficiency of the declaration, which alleged no construction by usage of the word *say*, used in this contract. Held, in the absence of any proof of fraud, the declaration did not allege a sufficient breach of the contract ; the true meaning of which was, that the quantity of *naphtha* made by the defendant would *probably* amount to one thousand or twelve hundred, and that the plaintiff should have all that he might make.(2)

30. Agreement, to have a boat ready for the spring trade on the first of March ensuing ; otherwise, to pay ten dollars damages for every day after that time, till the boat should be ready. Held, this was a covenant that the boat should be ready on the first of March for the spring trade, and that the promisee should recover damages for a breach, though it could not have been then used for that purpose.(3)

31. Contract for the sale of tobacco on board a vessel bound

(1) *Cross v. Eglin*, 2 Barn. & Adol. 106.

(2) *Gwillim v. Daniell*, 2 Crompt. M. & R. 61.

(3) *Young v. White*, 5 Watts, 460.

from A to B. "One fifth of the price to be paid in cash on a certain day; for the other four fifths the vendor to look to his correspondent abroad, the consignee of the goods." There was a further understanding, that interest should be allowed, as if the sale had been at two and three months from final delivery. The vendee to have the benefit of the vendor's policy in case of average. One fifth of the price was paid in cash. The property was sold at B, at a loss of two fifths of the computed value. Held, the vendee was responsible to the vendor for such loss. Any other construction would make the vendor liable to loss, but give him no chance of profit. The foreign arrangement was a mode of payment, provided merely for the accommodation of the vendee. The consignee not being able to make up the price, the vendee was bound to do it.(1)

32. Agreement by A to furnish straw to B, to be delivered at the premises of the latter; three loads per fortnight, for a specified time. B agreed to pay a certain sum per load for each load so delivered on his premises during the time. The straw having been sent for some time according to agreement, B refused to pay for the last load, claiming the right of always keeping one load unpaid for. Held, by the terms of the agreement, each load was to be paid for on delivery; and therefore A was not bound to furnish any more loads, after B's refusal and claim as above-mentioned. Perhaps it might have been otherwise had B merely *neglected* to pay according to agreement.(2)

33. Sale of merchandize by written agreement, at so much per load, to be taken by dock account, and paid for in cash, allowing two and one half per cent. discount, within fourteen days from date; to be taken on board, and the duty deducted. The duty to be paid by the vendee. Held, the discount was to be made on the sum paid the vendor only, without the duty.(3)

34. Goods shipped from abroad to a merchant in England, are to be paid for on a demand of freight, by net weight at the king's landing-scales, not by the weight specified in the bill of lading, unless there is an agreement to the contrary. And

(1) Hoffman v. Heyman, 2 D. & R. 74.

(2) Withers v. Reynolds, 2 Barn. & Ad. 882.

(3) Smith v. Blandy, Ryan & M. 260.

where a vendee paid freight according to the weight in the margin of the bill of lading, which was signed by the captain with the reservation "weights unknown;" held, the mistake was of fact, not of law, and therefore the account was not concluded, and that the excess paid might be recovered back. *Weight* was held to mean *net weight*. The jury found a usage in favor of the above construction.(1)

35. The defendant agreed to purchase from the plaintiff a large quantity of Campeachy logwood at so much per ton, to be of real merchantable quality. Such part thereof as impartial judges should pronounce otherwise, to be rejected. Sixteen tons out of three hundred proved to be of an inferior quality to that mentioned in the agreement. In a suit brought by the vendor against the vendee for non-performance of the agreement, held, the latter was bound to take such part of the logwood as corresponded with the contract, at the stipulated price; and that such price was the measure of damages, and not the amount of difference between the price and what the logwood would have brought, when the true quantity of Campeachy was ascertained.(2)

36. Agreement to deliver a quantity of iron, made at A, for a sound price. Iron was delivered which was made at A, and which the vendor believed good, but on trial it proved positively bad. Held, this was a fulfilment of the contract.(3)

37. The correct construction of a contract is often determined by facts or declarations not contained in the agreement itself, as, for instance, by a certain *notice* or *usage*.

38. At a repository for horses, certain rules were posted up, regulating private sales. Held, such regulations were binding upon parties contracting there, and having notice of them.(4)

39. A ordered from B, with whom he had previously dealt, *more* of a certain article, to be sent by a particular coach. At the office of this coach a notice was posted up, that the proprietors would be liable only to the amount of £5, unless the goods

(1) *Geraldes v. Donison*, Holt, 346.

(2) *Graham v. Jackson*, 14 E. 498.

(3) *Kirk v. Nice*, 2 Watts, 367.

(4) *Bywater v. Richardson*, 2 Nev. & Man. 748. 1 Ad. & El. 508.

were insured. The goods ordered by A exceeded this amount, were sent by this coach, and not insured; but there had been no insurance on goods sent in previous cases. The goods being lost, held, B might maintain an action for the price.(1)

40. Though a *usage of trade* cannot be set up in contravention of an express contract, yet, to explain an ambiguity, the general understanding of a particular trade may be shown.(2)

41. Certain mill-logs were sold, for so much per thousand, according to the quantity of lumber they should be estimated to make. A table or scale of estimation was so generally used, that the jury found the parties referred to it, in order to compute the quantity of lumber. Held, they were bound by such table, though somewhat erroneous.(3)

42. Agreement to deliver Salina salt in barrels. Held, the barrels must be such as were prescribed by the statute.(4)

43. A promise to pay a sum of money in wares of a certain trade, means articles which are entire, and of a kind and fashion in common use; not antiquated and unsaleable.(5)

(1) Cothay v. Tule, 3 Camp. 129.

(2) Powell v. Horton, 3 Scott, 110.

(3) Heald v. Cooper, 8 Greenl. 32.

(4) Clark v. Pinney, 7 Cow. 681.

(5) Dennett v. Short, 7 Greenl. 150.

CHAPTER II.

PARTIES TO THE CONTRACT OF SALE.

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2. *Married women—general disability.*
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11. *Liability of the wife.*

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 53. Under an order of Court, or legal process.
 63. Sales by or to partners.
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SECTION I.—MARRIED WOMEN.

1. All persons are competent to buy or sell, unless laboring under some special disability, which incapacitates them for making any valid contract.

2. A married woman or *feme covert* is incapable, for the most part, of buying or selling personal property. The law vests all her chattels in her husband, and of course she cannot sell that to which she has herself no title; nor, except under special circumstances, can she become a purchaser, so as to charge either herself or her husband with the price of the thing sold.

3. A husband is, under some circumstances, liable for necessities furnished to his wife. But, in order to charge him, the seller must prove either his express or implied authority for, or assent to the sale, or that the property was necessary and convenient, and suitable to his actual condition and fortune, and

that the wife is unprovided for, and has no adequate means of support. The circumstance of her living with him is strong evidence of his assent to her contracts, and has been held *prima facie* evidence that the goods were ordered by his authority, unless they were luxuries, or unsuitable to her station. Other acts of the husband may justify the same inference.

4. The husband may prohibit any particular individual from trusting his wife; and has, in general, the right of judging what is necessary for her use; but he cannot prohibit *all persons* from supplying her with necessaries. And, it seems, even his express dissent will not exempt him from liability, where the thing sold was absolutely necessary for her comfort. But if she has the means of support, though derived from her own resources, he is not liable. So, if it is clearly proved, that the credit was given *to her*. Her improper and lewd conduct, while he continues to live with her, will not exempt him from the liability to support her. And though they are separated, yet if he has the control of the goods purchased by her, and fails to return them, he is liable. If he turn her away, or without reason refuse to receive her, or treat her in such a way as justifies her leaving him, he is liable for necessaries, even to one whom he has expressly prohibited from trusting her. But if she leave him for any thing short of actual violence, or a reasonable fear of it, or a reasonable cause for refusing to cohabit with him, he is not liable. It is sufficient to charge a man, that he *represents* a woman as his wife, cohabits with her, or permits her to assume his name.(1)

5. If a wife purchase goods without the knowledge of the husband, and he, knowing of it, afterwards allow her to use or keep them, he is liable for the price. If, on being applied to for payment, he disavows any participation in her business, and denies that the goods were purchased in his behalf, the vendor

(1) 3 Barn. & Cr. 631. 63. 7 C. & P. 756. 3 Esp. 255. 3 C. & P. 16. 5 B. & R. 532. 5 Bing. 552, 3 Camp. 22. 4 Nev. & M. 589. 1 Camp. 120. Ld. Ray. 1006 Sid. 109. 2 New R. 157. 1 Salk. 118. 2 Star. 86. 6 Bing. 28. 5 Taun. 356. 1 Salk. 119. 6 Mod. 171. 3 Bing. 127. 5 C. & P. 200. 1 Y. & J. 501. 4 Burr 2177. 5 Bing. 28. Str. 1214. 3 Taun. 421. 2 Esp. 637. 1 Camp. 245. 4 Camp. 215. 3 B & C. 167.

may consider the agreement as rescinded, and retake or sue for the property.(1)

6. Where a wife elopes with an adulterer, the husband is no longer liable for any thing furnished her; because the circumstances are sufficient to put all persons on their guard. Otherwise, where, after acts of adultery by the wife, the husband leaves her in his house with children bearing his name, although she afterwards continue her criminal conduct; unless such conduct be brought home to the knowledge of the creditor.(2)

7. A man is liable for necessities supplied to a woman whom he has married and held out to the world as his wife, notwithstanding his previous marriage with another woman, unless he can clearly prove notice to the creditor of such marriage.(3)

8. Where the husband has himself brought to his house, and held criminal intercourse with, a woman not his wife; treated the wife with great cruelty and turned her away; and afterwards the wife is guilty of adultery, but offers to return to her husband, who refuses to receive her; he is not liable for goods supplied to the wife. But if, after her criminal conduct, he receive her back, and again turn her away, he is liable for necessities furnished her.(4)

9. If a wife elope, but not with an adulterer, and afterwards request the husband to receive her back, which he refuses to do; it seems he is liable for her subsequent support.(5)

10. Where husband and wife live apart, upon an agreement for separate maintenance, he is not liable for necessities furnished her, though the creditor were ignorant of such agreement, provided it was matter of general notoriety in the neighborhood. Otherwise, if the wife took up the goods immediately after leaving the husband. The separate maintenance need not be secured by deed, in order to discharge the husband; but it must be proportionate to his means, and shown to be so by other proof than merely the wife's assent. If the separate mainte-

(1) *Mackinley v. M'Gregor*, 3 Whart. 369.

(2) *Manby v. Scott*, 1 Sid. 109. *Morris v. Martin*, Str. 647. 6 B. & C. 200. 2 C. & P. 507. 3 M. & R. 121. 8 Wend. 544. 11 Wend. 33. 1 B. & P. 226.

(3) 1 Camp. 246.

(4) 6 T. R. 603. 4 Esp. 41.

(5) 3 Esp. 256. See Str. 875. 1214, n. 1. 11 John. 251. 12. 293

nance is secured through a trustee, and the husband fails to fulfil his contract, the trustee may maintain *indeb. assump.* against him for necessities furnished the wife, though the agreement is under seal.(1)

11. A wife is not rendered liable upon her contracts, by an allowance of alimony made to her in a suit in the Ecclesiastical Court between her and the husband;(2) nor by living apart from him under a contract for separate maintenance. This last point seems to have been finally settled as above stated,(3) after some previous decisions to the contrary(4). But a creditor, in such case, may have relief in Equity.(5) Divorce *a mensa* does not make her liable.* Divorce *a vinculo* does.(6)

12. Where the husband has permanently left the realm, by *abjuration* or banishment for life; or, it seems, where he has been transported, even if he remain abroad beyond the time assigned to him; the wife is liable. So, where the husband is by any means, for the time, *civiliter mortuus*, or the marriage contract is suspended or dissolved. And it seems, though the authorities upon the subject are somewhat contradictory, that it makes no difference whether the husband is an alien or a native, but the question turns entirely upon the consideration, whether the absence is intended to be temporary or permanent. If the husband is an alien enemy, the wife is liable, because he cannot lawfully be in the country.(7)

(1) 1 Ld. Raym. 444. 4 Camp. 70. 2 New R. 148. 8 John. 27.

(2) 5 T. R. 679.

(3) 8 T. R. 545.

(4) 2 Kent. 159.

(5) Long, 20.

(6) 3 B. & C. 291. 3 Br. & B. 92. 2 B. & C. 547.

(7) 1 Bos. & P. 338. 2 W. Bl. 1197. 4 Esp. 27. 2 B. & P. 232. 2 M. & W. 64. 1 Aik. 174. 15 Mass. 31. 6 Pick. 89. 4 M'Cord, 148. 2 M. & W. 64. 6 C. & P. 419. 9 Bing. 292. 7 Bing. 762. Salk. 116. 646. 1 B. & P. 357. 2. 226. 2 Esp. 554. 587. 2 N. R. 380, 1. 80. 3 Camp. 123. 1 Ld. Ray. 147. 2 M. & W. 64. 3 B. & C. 291. 2 B. & C. 547. Gow. 10.

* Otherwise in Massachusetts. 5 Pick. 461.

SECTION II.—INFANTS.

1. *Infants* constitute another class of persons, whom the law holds to be incapable of buying and selling, as well as entering into other contracts. To this disability, however, there are some exceptions. Thus an infant may legally purchase and bind himself to pay for necessities; that is, for the food, clothing, medical attendance, instruction, &c., which are suitable to his condition. So also for necessities furnished to his family. A *single bill*, promising to pay the precise sum due for necessities, is binding; but not a penal bond, negotiable instrument, or account stated. But notwithstanding these securities, an infant still remains liable to pay a reasonable sum for necessities. If, after coming of age, he promise to pay a negotiable instrument given during infancy for necessities, it seems, he is bound, provided he does it voluntarily and with full notice of his rights. But mere *part-payment* after coming of age will not bind him for the residue.*(1)

2. What articles the law will adjudge to be necessities for an infant, depends upon his real, and not his ostensible rank and fortune. The law requires the party who trusts, to make due inquiry. A captain in the army, under age, is bound to pay for a livery supplied to his servant; but not for cockades furnished his soldiers. A lieutenant in the navy is not bound for a chronometer. But an infant member of a volunteer corps is liable to pay for regimentals. An infant is not bound to pay

(1) Co. Lit, 172 a. Bull. N. P. 155. 9 Wend. 238. Str. 168. 8 E. 330. 1 Lev. 86. 7 Car. & P. 52. 10 John. 53. 1 T. R. 40. 4 C. & P. 104. 1 Camp. 552. 3 M. & S. 477. 6 Yerg. 20. Cro. Eliz. 583. 13 Pick. 1. 4 Esp. 188. 3 B. & Ald. 902. 17 Wend. 419. 2 Esp. 628. 5. 102.

* Where the plaintiff sold the defendant goods while the latter was a minor, but before receiving them she came of age; held, inasmuch as the property would vest in her, if at all, upon delivery to the carrier, she was not bound for the price. *Griffin v. Langfield*, 3 Camp. 254.

money which is loaned him for the purchase of necessities, unless it be thus appropriated. But, in Equity, he is liable for money borrowed to pay a debt for necessities. An infant cannot bind himself to pay for goods purchased to trade with, because the law regards him as incapable of trading.

3. Where an infant lives with his father and is properly supported by him, he is not liable even for necessities. So if he has been supplied by his friends or by other tradesmen, the creditor is bound to inquire into the proper quantity as well as quality of the articles with which he may be trusted.(1)

4. On the other hand, to charge a father even for necessities supplied to his child, the plaintiff must prove a deliberate desertion of the latter by the former. Nor is the father liable, if he had reasonable ground to suppose that the child was supplied. And the general doctrine is laid down, that, to charge the parent, an express or implied authority must be shown, to supply the articles.(2)

5. But any fraud or misrepresentation by the father will render him liable.

6. Sale of goods to an infant, on the false and fraudulent representation of his father, that he (the father) was about to relinquish his business in favor of the son. Held, an action might be maintained against the father as for goods sold and delivered. If he was jointly interested with the son, he was liable for the whole, no plea in abatement having been filed; and, if the son had no interest in the property, then the father appropriated the fund from which creditors expected to receive payment.(3)

7. It is to be understood, that the contracts of an infant are not in general, like those of a married woman, *absolutely void*, but only *voidable*, or liable to be avoided at the election of the

(1) 8 T. R. 578. Holt, 77. 5 Esp. 152. 28. 1 Salk. 386. 2 Esp. 472. 1 P. Wms. 554. 4 C. & P. 526. 3. 114. 669. . 61 Esp. 211. Cro. Jac. 560. 2 W. Bl. 1325. 4 Watts 80. 6 Car. & P. 690. Str. 1083. Cro. Jac. 494.

(2) 4 Ad. & El. 908. 1 C. & P. 1. 4 Ad. & El. 903. 6 C. & P. 286. 2 T. R. 161.

(3) Biddle v. Levy, 1 Stark. 20.

infant himself.* Consequently the promise of an infant is a good consideration for that of the other contracting party ; because, *at the time of the contract*, it cannot be known that the former will fail to fulfil his agreement.

8. The plaintiff, an infant, having agreed to take all the potatoes growing upon certain land of the defendant, paid a part of the price, and dug and carried away a part of the potatoes ; but the defendant would not permit him to take the remainder. Held, the plaintiff might sustain an action.(1)

9. The law, however, will not allow an infant to use his personal privilege as an instrument of fraud upon those with whom he deals. 'This privilege is designed "for a *shield*, not for a *sword*."' Hence, where the infant exercises his right of disaffirming a contract, the other party may reclaim the consideration which he has paid.

10. In December 1816, A and B commenced business as partners, and purchased their stock in trade of C, giving therefor their joint note for over \$700. A was then an infant, but represented that he should be of age in a month or six weeks. In March 1817, the partnership was dissolved, and B relinquished (to A) all his interest in the concern, who carried it on alone for a short time in his own name. The plaintiff then, in presence of B, agreed with A to buy of him all his stock, at cost, A to continue in the management of the business, receiving one third of the profits, and bearing one third of the expenses ; and a certain notice to be given, before putting an end

(1) Warwick v. Bruce, 2 Maule & S. 205.

* It is said, a contract *beneficial* to an infant, (as in the case of necessities,) is binding. One that is *prejudicial* is void ; while those neither absolutely beneficial nor prejudicial are voidable at his election. Long on Sales (Am. Ed.) 13. Of course these distinctions must be predicated upon the *original tendency* of the contract in question, or its *general nature*, not upon the actual results. The contract must be valid, void or voidable *at the time*. It has been further remarked, that the doctrine that certain acts done by an infant are not even *voidable*, has been only applied to cases of land, which it is said are necessarily required by law to be binding, otherwise the land would lie unoccupied. There is no case in which it is holden, that an executory contract by an infant, except for necessities, is binding. Moses v. Stevens, 2 Pick. 336.

to the contract. During the negotiation, the plaintiff inquired of A whether he was of age. A answered, in the presence of B, that he was. The plaintiff then gave his note to A and B for the stock, which they indorsed to C, and C thereupon discharged B from the old note first above mentioned. In the autumn of 1817, the plaintiff sold the stock remaining on hand to A at cost, additions having been in the mean time made to it. The plaintiff brings an action against A for the price, and attaches the goods. A having died, his administrator pleads infancy, and prevails in the suit. The plaintiff then brings the present action of replevin against the administrator, to recover the goods sold by him. Held, the action might be sustained. The sale in March 1817 to the plaintiff was *executed* by A. He delivered and received payment for the goods, and the law would not allow him to retain them, without restoring the money. The sale was valid, till rescinded, and A never expressed any dissatisfaction. The plaintiff delivered the goods, in the autumn, because A agreed to pay for them, and said he was of age. The basis of the contract had failed through the fault, if not the fraud of A, and the property either never passed, or had re-vested in the plaintiff.(1)

11. It is said, if an infant give or sell goods, and deliver them with his hand, he cannot maintain trespass against the other party. But if the latter take them by force of the gift or sale, he is liable to an action. Even in the former case, it seems the infant may avoid the sale during minority.(2)

SECTION III.—IDIOTS, LUNATICS, &c.—DURESS—ALIEN ENEMIES.

1. The contracts of sale, as well as other agreements, of idiots, lunatics, and persons of such defective understanding as disqualifies them to comprehend the nature of their own engage-

(1) *Badger v. Phinney*, 15 Mass. 359.

(2) *Long on Sales* (Am. Ed.) 14. 9 Cow. 626. 1 Mod. 137. 3 Burr. 1804.

ments, are of course void or voidable ; and it seems to be now well settled, though a contrary doctrine was once established, that they may allege their own incapacity in avoidance of their contracts. Mental incapacity to contract, consists in an essential privation, at least for a time, of the reasoning faculties, which disqualifies one for acting in the ordinary affairs of life.(1)

2. *Duress* also may avoid a contract of sale ; and this consists in actual unlawful imprisonment, or fear of death, wounding or imprisonment ; but not, it seems, in fear of a battery or loss of property. And the threats must be of a nature to terrify persons of ordinary courage.(2)

3. It is the general rule of law, that *an alien enemy* can maintain no action in the courts of the hostile nation ; but the exceptions and nice distinctions relating to this subject have no particular connection with sales of personal property, and are therefore wholly omitted in the present work.

SECTION IV.—AGENTS, FACTORS AND BROKERS.

1. Contracts of sale are often entered into through the intervention of *agents and factors*,* acting for the vendor or purchaser, or for both. The general rule in relation to sales and purchases made in this mode, as well as other contracts, is, that the *principal* or party employing an agent is as much bound by, and entitled to avail himself of, the act of the latter, as he would be if it were his own. The legal maxim is, “*qui facit per alium, facit per se.*”†

(1) 2 Kent, 452.

(2) 2 Inst. 483. 2 Kent, 453.

* A *factor* has possession as well as the disposal of property belonging to others. A *broker* merely the latter.

† It has been held in Pennsylvania, that although the above rule, that the sale of a factor is that of the principal, and the factor a mere *instrument*, is subject to certain qualifications ; there is nothing in the acts relating to *auctioneers*, to take them out of the general principle. The auctioneer's exclusive right of selling at auction has not

2. In case of sale by a factor, the contract is in fact between the owner and vendee, whether the factor is a *del credere* agent or not. Hence, after notice of the principal's title to the property, the vendee cannot be charged as trustee of the factor, except for the amount of the latter's commissions.(1)

3. A factor, acting under a *del credere* commission, sold goods in behalf of the plaintiff to the defendant, not disclosing the plaintiff's name, but known by the defendant to be a factor. The plaintiff, conformably to the usage between him and the factor, drew upon the latter for the amount of the sale. Before maturity of the draft, the factor stopped payment, and subsequently became a bankrupt. At the time of his stopping payment, there was a balance of account current between the factor and the defendant, in favor of the factor, but at the time of suit brought by the plaintiff against the defendant for the price, a balance in favor of the factor. Held, this suit might be maintained.(2)

4. An agent is either *general* or *special*. A *general* agent is one authorized to transact all business, or all of a particular kind. He can bind his employer only by acts within the scope of his employment, and within the usual course of dealing in that par-

(1) Titcomb v. Seaver, 4 Greenl. 542.

(2) Hornby v. Lacy, 6 M. & S. 166.

this effect ; for, inasmuch as the owner has no power to select his agent, he ought to have additional authority to call himself upon the purchaser. Nor does the fact, that auctioneers are under bonds to the state, change the general principle ; for the amount of the bonds bears a very small proportion to the value of the property sold ; and a private factor's giving security would not affect the right of the principal to call on the purchaser. So the auctioneer's receiving a commission does not vary the general rule. For, although this implies the general right of collecting from purchasers ; yet, the vendor may interpose and prevent it, and will thus make himself liable for the commission. As the auctioneer is bound to pay duties, and receives commissions, he has the right of collecting to this extent, and may so far retain the money and forbid payment to the principal ; and probably the vendee would be bound to take notice of this right. The case of Willing v. Rowland, (4 Dall. 106, n.) is said to favor the contrary doctrine, that the owner of the goods cannot maintain an action against the purchaser, but the auctioneer is the proper party. But this is said to have been a hasty decision. The case of Lea v. Yard, (Ib.) merely decides that the bond of an auctioneer is designed for the benefit of his private customers, as well as to secure payment of duties. Girard v. Taggart, 5 S. & R. 19.

ticular business. But no private order from the principal, unknown to the other party, will limit the agent's authority. Nor will it depend at all upon the question whether his acts are advantageous or otherwise. A *special* agent is one appointed to do some specific act or acts, and in the doing of these alone can he bind his employer. A party dealing with him is bound to inquire into his authority. But an agent employed to effect a certain object, has authority to use all the usual and proper means for accomplishing it, unless these are excluded by express instructions.(1)

5. It is the general rule, that an agent must execute his authority in person; he cannot delegate it to another, without the principal's consent, unless the business is of a nature which naturally or necessarily requires the employment of sub-agents.(2)

6. No particular form is requisite for the appointment of an agent to buy or sell personal property. A mere verbal authority is sufficient; and in some cases the power may be implied from other acts and dealings. Thus if a man send his servant with the money to buy goods, the servant cannot render him liable by purchasing on credit. But if a servant who usually buys for the master on credit, purchase certain articles without any order to do so, and if the vendor give credit to the master, he is liable for the price, more especially if the vendor has previously dealt with him. A general agency cannot be implied from a single recognized dealing, but only from repeated instances.(3)

7. The plaintiff brings an action for hay and oats furnished the defendant's horses. It appeared, that the plaintiff had never dealt with the defendant, but always with his coachman, to whom the defendant had periodically supplied money for this object. The debt was incurred several years before commencement of suit, and no demand made upon the defendant. Held, he was not liable.(4)

(1) Paley, 139. 200. 207. 9.

(2) Paley 175, 6, 7.

(3) 1 Shower, 95. 10 Mod. 111. 3 Keb. 625. 1 Str. 506. Peake, 47. 1 Ld. Ray. 224. R. & M. 227. 217.

(4) Kendall v. Andrews, Long, 220.

8. Where a master usually pays cash for a part of the goods supplied by a tradesman to his servant, this is sufficient notice, that he considers these only as furnished to his family, and the vendor is bound to ascertain the destination of the goods which he sells. Hence if he deliver them without payment or notice to the master, the latter is not liable, unless they come to his use.(1)

9. *Ld. Ellenborough* has thus stated the rule of law on this subject. The general rule is, that in order to bind one person by the act of another, the former must either antecedently authorize or subsequently adopt such act. If I authorize a man to obtain credit on my account, which he does, I am liable, unless I have paid him. And so if, *after the sale*, the money was given to the servant to pay for the goods, it seems the master is liable, in case the servant does not pay for them, because he has authorized the servant to purchase on credit.(2)

10. The plaintiff delivered a quantity of hay and corn at the stables of the defendant, but had never seen, or received any orders or money from him. The defendant kept a book with his coachman, in which entries were made of the things bought by, and sums advanced to, the latter. The advances were made on general account, and not specifically appropriated to particular items. The defendant gave the coachman money to pay the plaintiff's demand, but he applied it to his own use. Held, if the coachman was always in funds beforehand to pay for the goods, the defendant was not liable, never having authorized him to pledge his credit. But if he was not so in funds, he had a right to obtain credit, and the defendant was liable, notwithstanding the advance made to the coachman. A verdict was rendered for the plaintiff.(3)

11. Where a vendor brings an action and recovers judgment against his agent for the price of the goods, this is an affirmation of the sale, and the agent's right to sell cannot afterwards be disputed by him. Thus the defendant *bona fide* purchased goods from one A as the agent of the plaintiff, who brought an

(1) *Pearce v. Rogers*, 3 Esp. 214. 2 M. & W. 181.

(2) 5 Esp. 76.

(3) *Rushy v. Scarlett*, 5 Esp. 76.

action and recovered judgment against A for the price. The plaintiff now seeks to disavow the agency, and brings replevin against the defendant for the goods. Held, the former record was conclusive evidence for the defendant.(1)

12. Where one assumes to act for another without authority, if the latter, with notice of all the facts, expressly ratify, or fail for a reasonable time, to dissent from, the act done; he is bound as much as by a previous authority.(2)

13. Where no special instructions are given, a general power to sell implies a power to sell in the usual way; but not to barter, pledge, or sell in an unusual manner, or for any thing but cash, or upon the ordinary term of credit. A factor may sell on credit, though not expressly authorized, because such is the constant usage. But, for the same reason (reversed) a broker cannot thus transfer stock. If a factor, contrary to usage, sell on credit, no title passes to the vendee, unless the sale were in *market overt*; nor even then, if the vendee knew that the vendor acted for another.(3)

14. A factor has no power to *barter* the goods of his principal, even with one ignorant of his agency; but the principal may maintain trover for property thus disposed of; unless it be done in *market overt*.*(4)

15. One to whom goods are consigned for sale, is justified in incurring any expenses in effecting such sale, which a prudent man would find to be necessary in the discreet management of his own affairs. Thus, where the owner of a ship conveyed her to a creditor, to be sold by him to the best advantage, and after payment of his debt, the surplus to be returned to the debtor; held, the expense, in the form of commissions, of selling the vessel through the medium of a ship broker was a reasonable charge upon the gross proceeds of sale, unless some local usage could be shown to the contrary.(5)

(1) *Marsh v. Pier*, 4 Rawle, 273.

(2) 2 Kent, 615.

(3) *Paley*, 26. 212. 12 Mod. 514. 1 Camp. 258. 3 B. & C. 342.

(4) *Guerreiro v. Peile*, 3 B. & Ald. 616.

(5) *Colley v. Merrill*, 6 Greenl. 50.

16. The following cases familiarly illustrate the distinction between a *general* and a *special* agent. If a livery-stable keeper, having a horse for sale, directs his servant not to warrant the horse, but the servant disobeys the order; the master is bound, because the servant did not transgress the general scope of his authority, and a purchaser without notice could not be affected by any private instructions given to him. Otherwise, where the owner of a horse sends him by a servant to a fair for sale, with similar instructions. In such case, the servant alone is bound by the warranty.(1)

17. The plaintiffs, the E. I. company, sold a quantity of silks to the defendant, through a broker, whom the defendant had instructed to purchase *the best Bengal raw silk*. In an action for the price of the silk, the defence was that it was not raw silk, nor of the best quality. Held, the broker was a special agent, and having deviated from his instructions, the defendant was not responsible for his acts, nor liable to the present action.(2)

18. It is held in an old case, that where one appoints a factor to purchase for him a certain kind of property, as for instance *tin*, and that only; the factor may bind him to pay for an entirely different article, such as *silk*, (*saics*;) “and for that, let the master take heed what factor he makes.”(3)

19. Where a factor, having a general power to sell, is instructed to sell for not less than a certain price, and does sell for less; the principal is still bound, unless the vendee had notice of such instruction. On the other hand, though a special agent, with limited authority, cannot bind the principal if he exceed such authority, and, if he is expressly limited as to price, cannot go beyond such price; yet, though a price be specified, if the agent is at liberty to exceed it, he is not a special agent, and the principal is bound, though he go beyond the price named.(4)

20. A principal is bound by the representations or admissions of his agent, relating to the business of the agency; but not by

(1) *Fenn v. Harrison*, 3 T. R. 760. 2 Cr. & M. 392.

(2) *E. I. Co. v. Hensley*, 1 Esp. 112.

(3) *Petties v. Soam*, Gouldsb. 138.

(4) *Ambl.* 497, 8. *Hicks v. Hankin*, 4 Esp. 114.

any others. Thus in a prosecution to recover a penalty for selling coals short of the legal measure; the confession of the defendant's agent, employed to sell them, made previous to the sale, is admissible evidence; but not a confession relating to some former sale.(1)

21. A principal may always revoke a *bare* or *naked* authority conferred upon an agent, and will no longer be bound by his acts, after notice of such revocation to the agent and the party with whom he deals. It seems, he is bound by any *bona fide* acts of the agent, previous to receiving notice of the revocation, which are to his disadvantage; but may waive the benefit of those which are in his favor. He is also bound by any dealings of the agent with persons who have previously dealt with him, and who have not been notified of the revocation. Where a broker has *verbally* agreed to sell the goods of his principal, a revocation by the latter avoids the sale, it not being legally valid by the Statute of Frauds. If the agent has *a power coupled with an interest*, as where he is authorized to sell goods and apply a part of the proceeds to his own debt; the authority can be revoked only by the death of the principal. And even this is no revocation, where the power is of such a nature as may be executed in the name of the agent himself.(2)

22. It has been already intimated, that where one person purchases goods for another, but without disclosing his agency, the vendor may call upon the principal for payment, though he gave credit to the agent. So where the vendor merely knew that the nominal vendee was acting for another, but not the name of the principal. But if a vendor has notice who the principal is, and chooses to give credit to the agent, he can resort to the latter only.(3) And it is said, generally speaking, by the usage of trade, where an agent buys for a foreign house, the vendor cannot resort to the principal for payment.(4). And, on the other

(1) *Peto v. Hague*, 5 Esp. 134.

(2) 2 Kent, 644. Bac. Abr. Master, &c. k. 5 M. & R. 613. 10 R. & C. 137. 2 Mas. 244. 7 Ves. 28.

(3) 15 E. 62. 4 Taun. 574. 576, n. 9 B. & C. 78. 3 Doug. 410. 10 B. & C. 671. 6 M. & S. 1.

(4) Long (Rand's Ed.) 406, 7. 12.

hand, if one sell for a foreign house, he may sue in his own name.

23. A bankrupt coachmaker, who continued the business for the benefit of the assignees, purchased varnish in his own name. Held, he was a mere agent, and the assignees were liable to the vendor.(1)

24. It is to be understood, however, that a principal unknown at the time of purchase will be held liable as the real vendee, only *at the election* of the vendor. The agent may still be resorted to for payment. Upon the same principle, where one person *sells* property in his own name but for another's benefit; either the real or nominal vendor may bring an action for the price.(2)

25. *Public* agents are not personally liable, even under circumstances which would charge private agents in their individual capacity. Thus, where the governor of Quebec purchased corn and grease for the use of the lieutenant governor, commanding a fort in his province; he was held not to be personally liable. So a commissary is not liable for forage furnished for the army upon his order. So the captain of a troop of horse, during his absence, and while it is actually commanded by another, who issues the orders for subsistence for the men; is not liable to pay for such subsistence; though still entitled to a profit upon the sums issued on that account, and still commanding the troop. And though present with the troop, he is not liable for forage furnished by the orders of a clerk of his appointment, but receiving his directions from any officer who happened to command. But if the captain receive money from the paymaster of the regiment, to whom it is issued by government, and on whom the captain has the right of drawing for a certain sum, according to the returns of the preceding month; the party who furnishes the forage may recover the amount thus paid to the captain in an action for money had and received.(3)

26. It has been seen that an agent is always liable for goods

(1) *Kinder v. Howarth*, 2 Stark. 354.

(2) 7 Taun. 295. 10 B. & C. 671. 15 E. 272. 2 N. & M. 617.

(3) 2 Kent, 632. Paley, 377, 8. 1 T. R. 172. 180. 3 Taun. 560. 3 B. & B. 275. *Rice v. Chule*, 1 E. 579.

purchased by him, where the vendor receives no notice that they are bought for the use of another ; because in such case credit is given to the agent alone. The same rule applies, where such notice is given, but the vendor refuses to deliver the goods on the credit of the principal ; for then he has no claim upon the latter. So, also, where the agent discloses that he is acting as such, but after delivery refuses to give the name of his employer. But if the agent notifies the vendor that he is buying for another, and gives the name of his principal, he is not liable for the price.(1)

27. Where one contracts in writing to deliver certain goods, not disclosing that he is a mere factor at the time ; he is personally responsible for breach of the agreement, although, before suit brought, the promisee is informed of his being an agent.(2)

28. If an agent, purchasing goods, by the same writing acknowledges the receipt of them for his principal, and personally promises to pay the price ; he is individually responsible for the debt.(3)

29. A purchased a cup from B. B inquired whether he should send it to the house of A, and A replied, " I have nothing to do with it—send it to the clerk of the course at Lichfield"—(meaning the *race-course*, the cup being designed for a premium.) The clerk owed B on a prior account. The article was sent to the clerk, according to A's direction ; and B afterwards wrote to him, successively sending him an account, made out to himself, and threatening him with suit, if not paid. The clerk had requested A to order a cup for the above purpose. Held, A was not liable for the price. As he ordered the article, it must have been presumed that the credit was given to him, unless proved to have been given to another ; but the circumstances of the case, and more particularly the account made out to the clerk, showed that he was the person trusted.(4)

30. The relation between the master and the owner of a *ship*

(1) Owen v. Gooch, 2 E.p. 568.

(2) Paley, 250.

(3) Alford v. Eglisfield, Dyer, 230.

(4) Storr v. Scott, 6 C. & P. 241. See 5 Ib. 79.

constitutes a peculiar kind of agency, governed by principles somewhat different from the general rules of law above stated. Where a ship-master purchases necessities for the ship, although he discloses the name of the owner at the time; both master and owner are liable to the vendor. On the other hand, a ship-owner is responsible, though he have let the vessel to the master for a limited time, covenanting that he shall have the sole management of her, and employ her for his sole benefit, with a covenant by the master to repair the vessel, and though the owner was neither known to the vendor, nor knew of the sale. It might be otherwise, if facts distinctly showed, that the vendor gave credit wholly to the captain. But where goods were ordered for a ship by the owners, before the appointment of a captain, and some were delivered before, and others after, such appointment; held, the captain was not liable for any part, no credit having been given to him. Nor is he liable in any case, where it distinctly appears, that credit was given to the owners only.(1)

31. In order to charge an owner, the articles furnished to the captain must be such as were necessary or proper for the ship at that time, and such as any prudent owner might be expected to procure. The person attempted to be charged must be shown either to be legal owner, or to have so represented himself; or else it must be proved that the articles were sold upon his credit. Hence, in the absence of the two last requisites, a person to whom a conveyance of a vessel was made, void under the registry law, cannot be charged for supplies furnished to such vessel.(2)

32. Where one part-owner of a ship purchases necessary supplies, the others are liable, unless the contrary is specially agreed.(3)

33. The question may arise, whether an agent can charge his principal-as purchaser from him, of goods bought by the agent of a third person. On this point it has been held, that where

(1) Rich v. Coe, Cowp. 636. Farmer v. Davies, 1 T. R. 108. Cas. Temp. Hardw. 376.

(2) Abbott, 102. 19, n. 1. Harrington v. Fry, 2 Bing. 179.

(3) Abbott, 76.

one man employs another to purchase goods for him, and the agent buys and pays for them by a bill on time, the agent, it seems, cannot sue the principal for the price; certainly not, before maturity of the bill.

34. A, a foreign merchant, employed B to purchase goods for him on commission, which he did, from C. C, knowing the purchase to be made for A, made out the invoices to B, and took in payment his acceptances at six months. Held, the above facts did not constitute a contract of sale between A and B, or, if they did, no action could be brought by B against A for the price of the goods, until the expiration of six months. The commission to be paid B made him a factor or agent, and he became entitled to such commission upon the performance of his duty, that is, making payment for the goods. If A could be called upon immediately for the money, his object in employing B was defeated, and he stood in a worse situation than he would, if dealing directly with the vendor. A was the real purchaser, and B merely an agent in procuring the goods, and pledging his own credit, not generally, as a broker, but specially, by guaranteeing payment. In relation to C, the vendor, B may have been the principal and the vendee of the goods, and yet as between him and A, a mere agent.(1)

35. One who commits a fraud through a sale made by his agent is responsible to the vendee; as where a goldsmith by his servant sells counterfeit plate, or a taverner corrupted wine. And the principal is responsible in such case, even though the fraud was committed without authority from him, if done in his employment.* As where an agent sells counterfeit jewels for real and good ones, or diseased animals as healthy; or where a factor beyond sea sells silk as of one kind, which proves to be of another. The principal is charged in such cases, upon the common rule, that where a loss must fall on one of two inno-

(1) Seymour v. Psychlau, 1 B. & A. 14.

* An ancient authority (Bro. Abr., Action on the Case, pl. 8) seems to be *contra*, unless the act be done through the *covin*, or by command, of the master.

cent parties, it shall be borne by him who employed and trusted the deceiver.(1)

36. The preceding remarks are particularly applicable to the class of agents commonly called *factors*. *Brokers* constitute another important class, sustaining the same general relation. In a late case, a distinction is taken between *factors* and *brokers*, as to their respective power of binding their principals. *Factors* are said to have possession of the goods, a lien upon them, usually, for advances, and the right of selling in their own names, neither of which is true of *brokers*. Hence the latter do not appear to the world clothed with the same authority as the former, and have not the same opportunity of deceiving those who deal with them. The principal is not bound by the contract of a broker, exceeding his authority, unless it can be shown, that the former by his conduct gave the latter the means of deceiving third persons, that they actually were deceived, and that they were not themselves guilty of negligence.(2)

37. From this statement it may be inferred, that the actual authority conferred upon a broker is not in all cases the measure of his power to bind the principal. Thus if property is so placed in the broker's hands, as naturally to induce the belief on the part of third persons, that he is authorized to sell it; a sale by him will bind the owner.

38. A, a broker, engaged in the business of buying and selling hemp, purchased a quantity of hemp for B, who was in the habit of buying it at the London wharves. The hemp, at the time of purchase, was transferred in part into A's name, and the rest into the names of A or B. A afterwards sold the hemp to C. Held, B was bound by the sale.(3)

39. Certain brokers had been in the habit of purchasing and selling sugars on speculation, in their own names and at their own discretion, for their principal, and of paying and receiving the price. Sometimes, in a low state of the markets, they had unlimited authority as to quantity and price, at others, special instructions to purchase. They also received at intervals spe-

(1) Paley, 301. 3 Pet. 413. 13 Wend. 518. 1 Salk. 289. 2. 441. 2 Molloy, 334.

(2) Baring v. Currie, 2 B. & A. 148.

(3) Pickering v. Busk, 15 E. 38.

cial instructions to sell, and were limited as to price, and advised from time to time as to the prospects of the markets. They kept a general account with the principal of their payments to and receipts from him, not accounting separately for each lot purchased and resold. Having resold a particular parcel, which was bought and paid for in their own names, and lodged in their own warehouse, for a less price than was authorized by the principal; held, the sale was valid, its validity depending upon the general course of dealing of the parties, and not upon the private instructions in this particular case.(1)

40. Possession of the *muniments of title*, accompanying that of the goods themselves, it seems, is sufficient evidence of a broker's authority to sell. A, residing in London, having, as agent of B, imported certain goods, sent the invoice to B, but delivered the bill of lading to a warehouse-keeper, who entered the goods in his books as A's property. The bill of lading made the goods deliverable to the order of the shipper or his assign, and was indorsed in blank. Five months afterwards, A, without authority, sold the goods, and B brings trover against C, the purchaser. A verdict, having been rendered for the defendants, was set aside, and a new trial granted; because it was not left to the jury to say, whether B had enabled A to appear as owner.(2)

41. Where *brokers* effect sales or purchases of personal property, it is usually done by means of *bought and sold notes*, so called. In reference to these, the following cases have been decided.

42. In an action brought by the vendee of goods upon a contract made through a broker, the plaintiff is bound only to produce the *bought note* delivered him by the broker, and to prove that the latter was employed by the vendor. If the *sold note* varies from the *bought note*, the burden is upon the defendant to show this by producing the former.(3)

43. Where a contract of sale is made through a broker, the bought and sold notes, not the broker's entry in his books, constitute such contract; more especially if such is the established usage.(4)

(1) *Whitehead v. Tuckett*, 15 E. 400.

(2) *Dyer v. Pearson*, 4 D. & R. 648. 3 B. & C. 38.

(3) *Hawes v. Forster*, 1 Moo. & R. 368.

(4) *Ib.*

44. Where a sale is made through a broker, and the note of the bargain delivered by him to the vendee materially differs from that delivered to the vendor, there is no binding contract. The object of the note is, not merely to show that there was a bargain, but also the terms of such bargain; or, at least, the extent and entirety of the consideration for the promise upon which suit is brought. Hence, where the vendee refuses to take the goods, the vendor cannot maintain against him either a special assumpsit, or a count for goods bargained and sold.(1)

45. A *wharfinger*, with whom goods are deposited until they shall be sold, cannot make a valid sale of them, though accustomed to sell property of the same description from the wharf. The same is true of *warehousemen*, *packers* and *carters*.(2)

46. Upon the general principle, that property entrusted for a special purpose by one man to another continues to belong to the former, notwithstanding any change of form; where the goods of a principal are sold by his agent, or exchanged for others, any securities taken for the price, or property received in exchange, will be owned by the principal. From the peculiar nature of money, which has no *ear-mark*, it will be otherwise where the price is received in cash. In such case, the money belongs to the agent, leaving him accountable merely for the same amount. But if the money be kept by itself, or marked so as to distinguish it from any other; it is subject to the same rule with other kinds of personal property.(3)

47. All agents and factors are in a certain sense *trustees*, and subject to the general principles of the law of trusts. In this connection, however, it may be proper briefly to allude to the subject of sales made by trustees, technically so called; that is, by persons to whom either the law, or the party interested in property, has committed it, to be managed or disposed of by them, without authority to bind the principal in any other way.

48. Where property is in the hands of a trustee for sale, the law demands of him great care to promote the best interests of

(1) *Peltier v. Collins*, 3 Wend. 459.

(2) *Wilkinson v. King*, 2 Camp. 335. *Monk v. Whittenbury*, 2 B. & Ad. 484.

(3) *Long*, 427, 8, 9.

his *cestuys*, in making such sale, so far as is consistent with the rights of other parties concerned. He may sell either at public or private sale, unless specially restricted; but is bound to use all proper exertions to obtain the best price; and, having done this, he will not be responsible for any unfortunate result of the sale.(1)

49. In general, neither a trustee, nor any agent or auctioneer employed by him, can either directly or indirectly become purchaser of the property sold; unless the relation of trustee and *cestui* has been dissolved, or the latter acts with full notice and waives all objections to the sale on this ground, and the trustee takes no advantage of his peculiar situation. But a sale originally invalid may be ratified by the express confirmation of the *cestui*, made with full notice of his rights, and after all undue influence has ceased.(2)

50. Under this head, we may briefly refer to the subject of sales by executors and administrators.

In general, an executor or administrator may absolutely dispose of the deceased person's personal property, and pass a title, free of all liens and claims, to the vendee. So also he may mortgage such property. And the purchaser or mortgagee will not be bound to see to the application of the purchase money. But if a sale be made at a sacrifice to one having notice that there are no debts; if there be collusion between the vendor and vendee; or if the latter aid the executor, &c. in committing *waste* or other breach of duty; he will share his responsibility to the full value of the property; and creditors or legatees may within reasonable time follow it in his hands. An executor, &c. cannot sell or pledge the assets to pay or secure his own private debt. In general, it is no proof of collusion, that a party receives the property by way of sale or pledge, for a consideration advanced at the time, though such property is specifically disposed of by the will or otherwise. Otherwise, where he receives the property on account of a subsisting debt. To

(1) Lewin on Trusts, 367. 2 Rose, 66. 5 Madd. 440. 6 Sim. 504.

(2) Lewin, 376. 8 Cow. 362. 1 Pet. C. 364. Lewin, 390.

each of these rules, however, there may be exceptions, arising from peculiar circumstances.(1)

51. An executor may claim the price of goods belonging to the deceased, though sold without authority from him, and though the vendee have promised to pay another person.

52. An auctioneer, employed by a supposed executor, sold goods of the testator; but, before payment, the lawful executor claimed the price from the purchaser, who had expressly agreed to pay the auctioneer, on being allowed to take away the property, which he did. Held, the purchaser was liable to the lawful executor, and therefore the auctioneer could not sustain an action against him.(2)

53. Under the present title, also, may be considered the subject of sales made by virtue of a judicial order or decree, or upon execution; such sales being effected through the intervention of *agents*, appointed not by the party himself, but by the law.

54. Sales made under decretal orders of Chancery, are under the control of the Court, and may be rescinded or opened at any time previous to confirmation. But when confirmed, any error in the decree will not affect the title of the vendee. He has a right to presume, that a sale was properly ordered. But his title, it seems, is liable to be impeached by parties claiming the property, who were not properly brought before the Court. The Court will not protect him from a title not in issue, or affected by the decree; more especially, where he had notice of such title. And a sale is ineffectual, unless conformable to the decree.(3)

55. A sale on execution, conducted according to law, passes a good title, if the process be not absolutely void, though voidable for irregularity, or founded upon an erroneous judgment. Otherwise where the Court has no jurisdiction, or the execution

(1) 2 Wms. 609. 10. 12. 13. 2 Story on Eq. 384. 1. 544. 1 Atk. 463. 3. 237. 14 Ves. 358.

(2) Dickenson v. Naul, 4 Barn. & Ad. 638.

(3) 2 Sch. & Lef. 577. 3 Bligh. 188. 9 Ves. jr. 37.

is *void* for irregularity, or the proceedings of the officer do not conform to the requisitions of the law.(1)

56. It was formerly held in Massachusetts, that, in general, an execution purchaser, receiving and paying for the goods, acquires a title to them, notwithstanding any irregularity in the officer's proceedings. If it were not so, both creditor and debtor must suffer loss, because no purchaser of the property could be found. But the officer's return ought to show a compliance with the law; otherwise the vendee would not hold his title. A different rule from the above applies to the sale of shares in a corporation. These are more like *choses in action*, or mere *evidence* of property, and, at common law, cannot be sold on execution. Hence, the Statutory requirements must be strictly pursued, to give a title. If certificates of shares were given to the vendee, this would be more like delivery of a chattel. But even in such case, unless the return showed a compliance with the requisitions of the law, the corporation might not be justified in giving certificates to the purchaser.(2)

57. But, in a very recent case in Massachusetts, it has been decided otherwise with respect to the return of the officer. In this case, A recovered an execution against B, upon which C, an officer, seized and sold a horse, but the return did not state where the notifications were posted*. B brings trover against A and C. Held, parol evidence was admissible of a legal notification, and that the officer might amend his return. The Court remarked, that a different rule would operate to the injury of both creditor and debtor, because no purchaser would be found but at a very low price. Also, that the old rule was inconsistent with the principle, that a seizure of goods upon execution discharges the debtor, though the sheriff waste them or fail to return the execution. The case differs from a sale of *land* upon execution, for there, to give a perfect title, the pro-

(1) 1 Cow. 734. Cro. Eliz. 279. 1 M. & S. 425. 2 Conn. 700. 16 John. 537
8 Co. 141 b. 7 B. & C. 536. 10 Co. 63 b. 3 John. 523. Metc. Yelv. 180 n.

(2) *Howe v. Starkweather*, 17 Mass. 240. *Davis v. Maynard*, 9. 242.

* It mentioned merely "two public places" The amendment was said not to *contradict* the return, but only make it *more distinct*.

ceedings must all appear of *record*. (The action was remanded to the Court of Common Pleas, with instructions to the officer to apply to the magistrate who issued the execution, for leave to amend. And the amount of the execution was deducted from the value of the horse, in mitigation of damages.)(1)

58. The return upon an execution stated the advertisement of goods sold to have been made *twenty-four* hours before the sale. The debtor brings an action of trespass against the officer. Held, the defendant could not be permitted to show by parol evidence, that the time was *forty-eight* hours.(2)

59. A fraudulently purchases goods from B, and the goods are afterwards taken upon an execution against the latter. In an action by A against the officer, A cannot avail himself of any irregularity in the proceedings connected with the execution sale.(3)

60. Where the purchaser of property at an execution sale refuses to receive and pay for it, the officer may sell it anew.(4)

61. A sheriff cannot legally purchase goods sold by himself. Such purchase is a conversion, which will justify an action of trover against him. But he may show the amount paid to the creditor in mitigation of damages.(5)

62. Where goods have been levied upon by execution, and the judgment debtor sells them with the sheriff's assent, such sale does not divest the title of a previous purchaser from the debtor, though the previous sale would be void against the execution.(6)

63. In immediate connection with the subject of sales made by and to factors and agents, may properly be considered those made by or to *partners*. The right and power of one partner to bind his firm, depends in great measure upon the fact, that he is expressly or by implication their authorized *agent*, in relation to the partnership business.*

(1) Richards v. Smith, S. J. C. Norfolk, Oct. 1839.

(2) Purrington v. Loring, 7 Mass. 388. (See Law Reporter, Jan. 1840.)

(3) Daggett v. Adams, 1 Greenl. 198.

(4) Winslow v. Loring, 7 Mass. 392.

(5) Perkins v. Thompson, 3 N. H. 144.

(6) Frost v. Hill, 3 Wend. 386.

* This power is sometimes spoken of as resulting from the *joint tenancy* of partners. Gow, 80.

64. In general, a contract of sale made by one partner binds the firm. Each member is individually liable for the fulfilment of the entire agreement. But the rule applies to such matters only as are within the scope of the partnership business, or arise out of its regular transactions. With this qualification, also, a sale *to* one partner binds the firm to pay the stipulated price, although the vendee purchased with a fraudulent intent, and has actually applied the property to his own use; unless the vendor was privy to such intent.(1)

65. With regard to sales made *by* a partner of partnership property, the following distinction has been taken. Where the property is of such a nature, as shows that it is intended to be sold, and the profits of the concern to be derived from a sale; a sale by one is not only sufficient to pass the title to a purchaser, but, as between the partners themselves, is regarded as the joint act of all, and creates no liability on the part of the vendor to the other partners, except accounting for a share of the profits. But where partnership property is from its nature properly intended only *for use*, as, for instance, in the case of tools and machinery; although the sale by one may be considered as valid against all, so far as to pass a title, yet it is a wrongful act on the part of the vendor towards the other partners.(2) In a case in Massachusetts, where one partner had undertaken to dispose of a *ship* belonging to the firm, it was objected that the general rule did not apply to this species of property, on the grounds of its superior value, and its being usually transferred by sealed instruments. But the Court, recognizing the power of one partner to dispose of any other partnership effects, held that ships did not constitute an exception to the general rule.(3)

66. Partnership in a particular adventure, as well as in general trade, authorizes one member of the firm to sell the partner-

(1) *Rice v. Shute*, 5 Burr. 2613. 2 Cox, 312. 2 B. & A. 673. 1 Cr. & J. 500. 1 Sim. 376. 1 Camp. 185. 12 E. 317. 2 B. & A. 795. 6 B. & C. 551. 9. 532.

(2) *Vickery v. Taft*, Chip. (Verm.) 242. See 3 John. 70. 4. 277. Godb. 244. Gow, 79. 5 B. & A. 405. 2 B. & A. 678.

(3) *Lamb v. Durant*, 12 Mass. 54.

ship property. But one *part-owner* or *tenant in common* has not the same power.(1)

67. A subsequent ratification by one partner of a sale made by another, binds the former as effectually as a previous authority.

68. A and B were jointly interested in a stock of oil. A contracted to sell it, without authority from or notice to B. B, on being notified, refused to be bound by the contract, but afterwards verbally assented. Samples were delivered to the purchaser. Held, the ratification was equivalent to a previous authority.(2)

69. Where there is a doubt, whether a party purchasing goods bought them for himself alone or for the benefit of others also, as partners; to prove the latter point, evidence may be offered of acts subsequent to the delivery of the property. But such evidence will be insufficient to charge third persons, who afterwards become partners, if it is clearly shown that no partnership existed at the time. If one partner purchases in his own name, but the property is delivered to all, the firm are bound. So, if several persons agree to share in goods to be purchased, and in pursuance of such agreement one of them makes the purchase, though without express authority from the rest, and as for himself only. But it is otherwise, where several persons, though jointly interested in the same general business, have distributed it among themselves, each taking the exclusive management of a particular section. Thus, where several persons were jointly concerned in running a stage, and each supplied horses for a certain part of the route; it was held, that one who furnished grain to one of the partners could not hold the others for the price.(3)

70. The warranty, misrepresentation or fraud of one partner in buying or selling, within the scope of the partnership business, binds the firm.(4)

71. After dissolution of a partnership by bankruptcy or

(1) Collyer, 218. 5 B. & A. 395.

(2) Soames v. Spencer, 1 Dow. & Ry. 32.

(3) Saville v. Robertson, 4 T. R. 720. Gouthwaite v. Duckworth, 12 E. 421. Barton v. Hanson, 2 Taun. 49.

(4) Collyer, 241—252.

otherwise, one partner has no power to dispose of the partnership property. But a secret act of bankruptcy on the part of one will not prevent the other, being solvent, from selling the joint effects, if done without fraud, and for valuable consideration.(1)

72. One of four partners having died, and the partnership being thereby dissolved, one of the survivors took out administration upon the estate of the partner deceased. The three survivors then formed a new firm, and took the stock on hand, each giving his note, payable to the three, for one third of the appraised value. Held, the supposed sale was void, and the three survivors were jointly accountable to the funds of the old firm for the value of the stock.(2)

73. The following case turns upon the distinction between a sale made in construction of law to one really but not ostensibly connected with the nominal vendee, whereby he becomes party to the original purchase; and a mere *sub-sale* to him by the former purchaser.

74. An indictment for selling a lottery ticket alleged that it was sold to A and B. The evidence showed, that A and B agreed to go shares in a ticket, and afterwards A, in presence of B, selected the ticket from a number produced by the defendant at A's suggestion. Both paid their respective shares of the price, B laying the money on the counter. A, with B's consent, kept the ticket till the drawing of the lottery. The ticket having drawn a prize, the defendant paid the whole to A, and A paid B his share. There was no communication between A and B, from the time of purchase till information was given of the prize, and the money paid. Held, the facts supported the indictment by showing a joint purchase. It was immaterial, whether the defendant was paid by the particular money advanced by each of them, or otherwise. As there was no subsequent agreement, B must have been *originally* an owner, because he received a part of the prize. Even if B had advanced nothing, nor been present at the sale, the purchase according to a prior agreement would be a joint act and vest the title in both, B be-

(1) *Hague v. Rolleston*, 4 Burr. 2174. *Fox v. Hanbury*, Cowp. 445.

(2) *Washburn v. Goodman*, 17 Pick. 519.

coming indebted to A for the price. It was so far a partnership, that one might act for both, contract for the purchase, receive a delivery, and in case of credit bind both for the price. The fact that the defendant was ignorant of B's interest, made no difference. There was no *sub-sale*, as in the case of *Young v. Hunter*, 4 Taun. 581.(1)

75. A sale may take place as well *between* partners or joint owners, as from or to them, to or by a third person. The general principle is, that where two parties are jointly interested in the same property, each stands to some extent in the relation of *trustee* to the other, and is subject to the restrictions and liabilities, in buying and selling the common property, which that relation involves. But in a recent case in Massachusetts it has been held, that where two tenants in common of a ship are not jointly engaged in buying or building ships for sale, they are not placed in such a relation of mutual trust and confidence with respect to the sale of the vessel, that each is bound in dealing with the other to communicate all the facts known to him, which may affect the price or value ; but they may deal with each other as distinct owners. Thus one of them, in bargaining for a purchase from the other of his share, is not bound to inform him that a third person had previously agreed to pay him (the vendee) a larger price for the whole. But any studied effort at concealment, or even slight fraudulent suggestion or representation, would avoid the sale ; if such suggestion was any part of the vendor's inducement to sell, though not the predominant motive. In an action brought by one part-owner against another for such fraudulent representation, it was held, that the defendant might show, for the purpose of disproving fraud, and upon the question of damages, that he paid the full value of the vessel ; but that the price agreed to be paid the defendant by the third person was strong, though not conclusive evidence of the value.(2)

(1) *Commonwealth v. Lang*, 14 Pick. 76.

(2) *Matthews v. Bliss*, 22 Pick. 48.

CHAPTER III.

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SECTION VIII.—ACCEPTANCE.

SECTION I.—GENERAL PRINCIPLES AND EXCEPTIONS THERETO.

1. By the common law, a sale of chattels, as between vendor and vendee, passes the title without delivery.(1) But there are two points of view, in which the question of delivery becomes highly important, and which have given rise to very numerous decisions upon the subject. One arises from a provision of *the Statute of Frauds*, making delivery an equivalent or substitute for a written agreement, and effectual to bind the bargain, which, under that statute, would otherwise be void. The other has relation to *the rights of third persons*, who are connected with, or claim under the vendor, by attachment, execution, subsequent conveyance, or otherwise; and involves the very important and voluminous law of *fraudulent conveyances*. In regard to the latter point, it is said to be the general rule, that delivery of possession is necessary, in the conveyance of personal chattels, as against every one but the vendor.(2)

2. But where a sale is *bona fide* and for valuable consideration, slight evidence of delivery is sufficient. And it is enough for the vendee to take possession with consent of the vendor, though there be no formal delivery.(3)

3. The terms of a sale being settled, the vendor accepted the vendee's promise to pay the agreed price to a third person, not making actual payment a condition of sale. Held, the vendee gained a title to the property with the actual possession, by con-

(1) See Hob, 41. Holt, 20. n.

(2) *Lanfear v. Sumner*, 17 Mass. 113. *Ricker v. Cross*, 5 N. H. 571.

(3) *Shumway v. Rutter*, 8 Pick. 443.

sent of the vendor, express or implied ; this being equivalent to formal delivery.(1)

4. The law recognizes a constructive, as well as actual delivery ; and it is upon the question what constitutes such constructive delivery, that most of the cases in the books have arisen.

5. A sale, without delivery or possession taken by the vendee, passes the title, if the property is of such a nature, and so situated, that his possession would be impracticable or inconvenient. And where the thing sold is not present, even a symbolical delivery is perhaps unnecessary. Thus where goods are ponderous and incapable of being handed over from one to another, there need not be an actual delivery, but only that which is tantamount, such as the delivery of the key of a warehouse, in which the goods are lodged, or of other *indicia* of property, or some act of the vendee from which possession and ownership may be inferred.*(2)

6. A purchased from B the boards which should be manufactured from a certain quantity of logs in B's possession, to be paid for at so much per hundred feet, when sawed. The logs were sawed and piled, and A notified thereof. Held, this was a sufficient delivery of cumbersome articles, to pass the property to the vendee.(3)

7. A agreed with the managers of a lottery, to take 2500 tickets, giving approved security for the price upon delivery. The tickets were specified in a schedule, and deposited in books of a hundred each, thirteen of which were received and paid for, and the remaining twelve superscribed with the name

(1) *Bucknam v. Nash*, 3 Fairf. 474.

(2) *Jewett v. Warren*, 12 Mass. 300. *Badlam v. Tucker*, 1 Pick. 389. *Ricker v. Cross*, 5 N. H. 571, 2. *Parsons v. Dickinson*, 11 Pick. 354. *Chaplin v. Rogers*, 1 E. 194, 5. *Rice v. Austin*, 17 Mass. 197. *Howe v. Starkweather*, *Ib.* 240.

(3) *Bates v. Conkling*, 10 Wend. 389.

* By the *civil law*, there are various ways of taking possession of property sold, corresponding to the ceremonies in our law, of the acknowledgment and registration of deeds, delivery of keys, or giving a bill of lading of goods at sea. But the property in goods does not pass without actual or legal delivery. *Lanfear v. Sumner*, 17 Mass. 114.

of A by himself, and indorsed by the agent of the managers, thus—"purchased and to be taken by A," with a further indorsement upon the envelope covering the whole—"A, twelve books." At the second day's drawing, one of the last designated tickets drew a prize of \$20,000. Between the third and fourth days' drawing, A tendered sufficient security, and demanded the remaining 1200 tickets, but the managers refused to deliver the prize ticket. Held, the property of the tickets passed to A when the selection was made and agreed to, and they remained in possession of the vendors only as security. Hence A might recover the prize. The contract was an entire one, and not divisible. The article, though bought in general terms from a large number of the same description, yet being afterwards selected and set apart with the assent of parties as the thing purchased, was as much identified and sold, as if selected before sale, and specified in the contract.(1)

8. Sale of logs lying in a *boom*. The vendor went in sight of the logs with the vendee, and showed them to him, but the latter placed no person in keeping, allowing them to lie as they were, till he should have occasion to use them. The transfer was made by a bill of parcels, attested by a witness, valuing the property at \$1602, and acknowledging payment received "by indorsing for me at the Kennebunk bank for \$1350." The vendee was at the time a surety for the vendor to this amount. The day after the transaction, the vendor died, and his administrator took charge of the logs, which were otherwise in danger of being lost. Held, the vendee might maintain *trover* against the administrator, there having been a sufficient delivery to pass the property. The fact of the defendant's taking care of the logs made no difference, as they were pledged for less than their value, and he had therefore a valuable interest to protect. Nor could it be objected, that the sale was an absolute one; for the very form showed it was not, and this must have been known to the witness. Neither was there any want of consideration, because the transfer was a pledge, and the mortgagee might be compelled to pay the debt. For this reason, the

(1) Thompson v. Gray, 1 Wheat 75.

excess in value of the property over the debt was immaterial and the case showed no fraud.(1)

9. Where one person contracts absolutely with another to sell him ponderous articles, which are left upon land purchased by the latter, and in his possession, and have ever since remained there, in his power ; held, this is a sufficient delivery of the articles.(2)

10. Marking the name of the vendee upon the articles purchased, has been held to some extent a constructive delivery.

11. A went into the cellar of B, and selected several pipes of wine, agreeing to pay a certain price for them. The *spills* were then cut off, and B's clerk marked A's initials on the casks, in presence of B, and A took the gauge numbers. Held, these acts amounted to a delivery ; but as the delivery was merely *incipient*, A might maintain an action against B for non-delivery of the wine.(3)

12. But under some circumstances, this act does not amount to a delivery.

13. The plaintiff sold to the defendant certain casks of wine lying in the London docks, and marked them with the defendant's initials, at his request and in his presence ; but the terms of payment were agreed upon, not at the time, but in a subsequent conversation, being a credit of two months. Held, the contract was not complete at the time of marking the wine, and the facts did not constitute a sufficient delivery to take the case out of the Statute of Frauds ; that the defendant could not have maintained trover for the goods, if not delivered, for the seller would have had a lien upon them for the price ; and consequently that this action, for goods sold, did not lie.(4)

14. A being a surety for B, a minor, upon a note which A afterwards paid, B conveyed to him by a bill of parcels, one third of a machine owned in common with C ; the bill having a memorandum attached to it, that the transfer was to be void on payment of the debt by B. The agent of B went to the mill

(1) *Jewett v. Warren*, 12 Mass. 300.

(2) *De Ridder v. M'Knight*, 13 John. 294.

(3) *Anderson v. Scot*, 1 Camp. 235, n.

(4) *Proctor v. Jones*, 2 Carr. & P. 532.

where the machine was, and delivered the property to A, showing him the machine, and declaring that he made delivery of B's third part of it. At and after the time of delivery, one D improved the machine under a parol lease from E one of the owners, who acted for the rest, and accounted to them for the rent. A claimed no rent, and E agreed to indemnify D from any such claim. Afterwards, E claimed the whole property. The machine was subsequently seized upon an execution against the joint owners, and sold by the sheriff, notwithstanding a notice of A's title, and a prohibition of the sale, one of the other owners, however, denying the title of B. In an action brought by A against the officer, held, there was an effectual transfer of B's title, there having been all the delivery which under the circumstances was possible.(1)

15. A had agreed to sell live oak timber to the United States. The plaintiff advanced funds to him, to be invested in this kind of timber in Florida, the timber to be procured, cut and transported at A's expense, but on account and at the risk of the plaintiff, to the navy yards. A to have one half the profits, and the plaintiff the other half, besides having the principal sum advanced, repaid. A consigned a quantity of timber to the plaintiff; the latter had the bill of lading, and indorsed his orders upon it, directing the ship-master, who was appointed by A, to proceed to the navy-yard, and deliver the timber. While he was doing it, a creditor of A caused the timber to be attached as A's property. The plaintiff did not go on board after arrival of the ship, and before the attachment. Held, under the circumstances, the plaintiff had an authority, coupled with an interest, in the disposal and proceeds of the property; that possession was to be inferred from his dealing with it as his own by indorsing the bill of lading; and therefore that he had a lien for his advances, and might maintain an action against the attaching officer.(2)

16. Upon a similar principle, where goods are wrongfully *attached*, they may be sold by the owner, and no delivery is ne-

(1) *Haskell v. Greely*, 3 Greenl. 425

(2) *Rice v. Austin*, 17 Mass. 197.

cessary to vest an interest in the vendee. But as only a *chose in action* passes, the vendor may bring an action against the officer in his own name, though for the vendee's benefit.

17. The property of A was attached in a suit against B. While under attachment, A sold it to C. Held, an action might be brought (in the name of A) against the officer for C's benefit, and that C, having purchased merely a *chose in action*, could not sue in his own name.(1)

18. And under some circumstances, the attaching officer himself may make a valid delivery, as the agent of the vendor.

19. A gave a bill of sale of a vessel without consideration to B, and B, with A's consent, conveyed her to C, a creditor of A. After the transfer to C, an officer who had before attached the vessel on behalf of other creditors, discharged the keeper, and delivered the vessel, lying at A's wharf, to C. Held, a valid delivery, if made with the consent and on account of A.(2)

20. On the other hand, where property sold is incapable of delivery at the time, and a creditor of the vendor attaches it before the vendee obtains possession, the sale shall prevail over the attachment, and the vendee may maintain trespass.

21. A assigned to B among other things a chaise and harness, which were then at a distance, in possession of C. Before B could obtain possession, the property was attached by A's creditors. Held, B might recover against the officer.(3)

22. A sold goods to the plaintiff on Saturday night, and the latter used due diligence to obtain possession on Sunday; but on the latter day, a creditor of A obtained possession and secreted the property, and on Monday caused it to be attached. Held, the plaintiff might maintain trespass both against the officer and the attaching creditor.(4)

23. One A sold to the plaintiff a mare, then being in the livery-stable of B, who had a lien upon her for the keeping. Upon the day of sale, both A and the plaintiff by letters, duly received, informed B of the sale, and requested him to keep the mare

(1) *Holly v. Huggeford*, 8 Pick. 73.

(2) *Boyd v. Brown*, 17 Pick. 453.

(3) *Ricker v. Cross*, 5 N. H. 570.

(4) *Parsons v. Dickinson*, 11 Pick. 352.

for the plaintiff. Soon afterwards, the mare was attached as A's property, B not having then written to A or the plaintiff, but being ready to make delivery to the latter. B required payment of the sum due him, before he would allow the officer to make an attachment. In an action of trover by the plaintiff against the officer, held, the above transaction passed the property, both as between the parties and in relation to creditors; that the action was therefore sustained, and, in estimating the damages, the sum paid by the officer was not to be deducted, being a claim of the defendant against A.(1)

24. An order drawn by the vendor of goods upon the depositary of them, and delivered to the vendee, is sufficient to pass the property under the Statute of Frauds, more especially if accompanied by a bill of parcels.(2)

25. Where goods sold lie at a wharf, lodging with the wharfinger a delivery order, with a power of sale, passes the property, without re-weighing or re-housing them. Upon the bankruptcy of the vendor, his assignees cannot maintain *trover* against a purchaser from the first vendee, as for goods "in the order and disposition" of the bankrupt.(3)

26. The vendor of malt sent an order to the warehouseman having possession of it, to hold it on account of the vendee. The warehouseman gave an acknowledgment in writing that he thus held the malt. In an action of *trover* brought by the vendee against the warehouseman, held, it was no defence, that according to the established usage, malt must be re-measured before it is sold; and that prior to such re-measurement, the vendee had failed. The warehouseman by his acknowledgment *attorned* to the vendee.(4)

27. A sold goods to B, taking his note at sixty days for the price. B sold the same goods to C and gave him an order upon A for delivery, which however was not immediately presented, nor A informed of the sale. B having become insolvent, A de-

(1) *Tuxworth v. Moore*, 9 Pick. 347.

(2) *Searle v. Keeves*, 2 Esp. 598. *Hollingsworth v. Napier*, 3 Caines, 182. *Pleasants v. Pendleton*, 6 Rand. 473.

(3) *Tucker v. Ruston*, 2 C. & P. 86.

(4) *Stonard v. Dunkin*, 2 Camp. 344.

posited his note, together with the goods, in the hands of D, as security for a debt due to D from A. C having demanded possession from A, who refused to deliver it, on account of B's bankruptcy and non-payment of the note; held, C might maintain *trover* against D.(1)

28. By a usage of trade in Liverpool, the vendor of goods was bound to pay warehouse rent for two months from the time of sale, if they remained so long in his possession. The vendor's agent, within this period after the sale, gave the usual delivery order to the vendee, who paid the price. During the two months, the goods were distrained for rent, and the agent of the vendee, having paid the rent to redeem them, brings *assumpsit*, for money paid, against the vendor. Held, the property of the goods had vested in the vendee, and he must bear the loss, in the same way as if they had been destroyed by fire. Hence, this action could not be maintained.(2)

29. A sold to B, for an agreed price, 119 barrels of flour, lying in a certain warehouse, and having upon them the brand of eight different mills. B gave a check for the whole amount, and A gave B a bill of parcels, stating the number of barrels of each brand, an order on the warehouseman, and a receipt for the price. Held, this was an executed contract, which passed the property to B; that the warehouse, flour and check having all been destroyed by fire before delivery of the flour, the loss must fall upon B; and that A might sue for the price.(3)

30. A, a manufacturer, deposited goods with B, a wharfinger at Stockton, to be shipped to C's wharf in London, taking receipts therefor. Upon these receipts, A indorsed orders upon C to deliver the goods, when they should arrive, to D, who had advanced money upon them. D sent the receipts and delivery orders to C, and demanded the goods. C answered, that the goods had not arrived, but when they did arrive, they should be forwarded to D. Held, D might bring *trover* against C for the goods, who by his reply to D's application assented to his title. Nor did it make any difference, that at the time of such assent

(1) *Hunn v. Bowne*, 2 Caines, 36.

(2) *Greaves v. Hepke*, 2 B. & A. 131.

(3) *Pleasants v. Pendleton*, 6 Rand. 473.

the goods had not arrived. There was an *attornment* to D, though prospective; like a promise by a tenant to attorn, made before he has entered upon the premises. It seems, a wharfinger's receipt passes the property in the goods by indorsement, like a bill of lading.(1)

31. Upon the same principle, where usage requires a *delivery order* to vest a title in the vendee, the property will not vest without such order, notwithstanding other symbolical acts of ownership on the part of the purchaser. Thus, A purchased of B forty-six puncheons of rum in B's warehouse at Liverpool, and re-sold them to C, a clerk of B, doing business on his own account. A gave C an invoice, mentioning the marks and numbers of each puncheon, and took his acceptances for the price. The rum and the samples taken remained in B's warehouse. It was proved to be an invariable usage in Liverpool, upon the sale of goods lying in a warehouse, for the vendor to give the purchaser a delivery order. C demanded such orders from A in the present case, but A refused them for all but two or three puncheons, which C received. The casks were marked, coopered and gauged by C. Before maturity of the bills, C sold twenty-six puncheons to D, who paid for them, and, by permission of C, but without the knowledge of A, gauged and coopered the casks in the warehouse, and marked them with his initials. C gave an invoice to B, mentioning the marks and numbers of the casks, and by whom the rum was branded. Before maturity of the bills, C also sold eighteen puncheons to two other persons, and gave them similar invoices and samples. These persons afterwards obtained such puncheons, upon a delivery order signed by themselves, but not by A. They also paid C for the whole. C's bills, given in payment for forty-four puncheons, were dishonored. Held, under these circumstances, C never had actual possession, upon the dishonor of his acceptances A had a lien for the price, and the parties who re-purchased from C could not claim as against A the rum which remained undelivered. With respect to the acts relied on to show a change of property; the coopering might have been done for

(1) *Holl v. Griffin*, 3 Moo. & Scott, 732.

the purpose of ascertaining whether the casks were in order ; and the marking could have no peculiar effect, because C knew that he had no delivery order. He was the clerk of B, had the management of his cellar, and could therefore mark and gauge at pleasure. These acts might have vested the property in him, if B had approved of them, knowing that C had purchased from A. The delivery of one part was in this case no legal delivery of the whole, because accompanied with an express refusal to part with the whole. Nor was C's taking samples a constructive delivery of the whole, as they constituted no part of the bulk. He took two puncheons, for the purpose of separating them from the rest. A's lien was suspended while the bills continued to run, but revived upon their being dishonored. The case was said to turn upon two points. 1. Where the goods remain in possession of the vendor, unpaid for, he may retain till payment ; if in possession of his agent, whether warehouseman or carrier, he may stop them *in transitu*. 2. The second vendee could be in no better situation than the first.(1)

32. Where goods lying in a dock are sold, it seems, *a transfer in the dock books* is a sufficient symbolical delivery.(2)

33. Delivery of *a receipt given by the store-keeper* who has the custody of the goods, is sufficient to pass a title ; this being the proper documentary evidence.(3)

34. In case of any sale of goods, the common course is for the vendor to deliver the vendee an *invoice*, but that does not vest the actual possession.(4)

35. But where goods which have been shipped and are at sea are sold, delivery of an invoice, with an assignment of the goods indorsed upon it, is sufficient to pass property.(5)

36. Delivery to a vendee of the key of a warehouse where the goods lie, is a sufficient delivery under the Statute.(6)

37. A sold goods to B and made delivery of a part of them, agreeing also to deliver the key of the shop which contained

(1) Dixon v. Yates, 5 Barn. & Ad. 313.

(2) Proctor v. Jones, 2 Carr. & P. 535.

(3) Wilkes v. Ferris, 5 John. 335.

(4) Dixon v. Yates, 5 Barn. & Ad. 335.

(5) Gardner v. Howland, 2 Pick. 599.

(6) Wilkes v. Ferris, 5 John. 335.

the rest to C, which was accordingly done, for the use of B. A afterwards sold the part which remained in the shop, to D, who obtained possession of them by borrowing the key from C. Held, B might maintain trespass against D, there having been a constructive delivery of the whole property to B.(1)

38. So, taking a lease of the house in which the goods lie, is a sufficient delivery, though the vendor afterwards remove them to another building.

39. A quantity of furniture, being in a tavern, was sold ; and the vendee took a lease of the house, went there to live, and used it in common with the vendor, who had occupied under a previous lease, and continued to do so and to keep the tavern. The vendor afterwards removed to another house, carrying the furniture with him, and continued to use it as his own. Held, there was a sufficient delivery, and the property could not be attached as the vendor's.(2)

40. Where a vendee is in possession, no delivery is necessary.*(3)

41. The lessee of a brick-yard and the brick-maker were joint owners of the bricks made in the yard. The lessee transferred his interest in the yard and bricks, and delivered possession to assignees, who appointed the maker their agent to sell the property. He accepted and acted under the agency, and then sold to the assignees all his interest in the bricks that remained. Held, no delivery was necessary, because the assignees were already in possession.(4)

42. Upon the same principle, where property lying in a yard is sold, facts showing a constructive possession of the premises

(1) Chappel v. Marvin, 2 Aik. 79.

(2) Shumway v. Rutter, 8 Pick. 443.

(3) Chapman v. Searle, 3 Pick. 38. Manton v. Moore, 7 T. R. 67.

(4) Macomber v. Parker, 13 Pick. 175.

* This is also the doctrine of the *civil law*. "Interdum etiam sine traditione nuda voluntas domini sufficit ad rem transferendam; veluti si rem quam tibi aliquis commoverit aut locaverit aut apud te deposuerit, postea aut vendiderit tibi aut donaverit aut dotis nomine dederit. Quamvis enim ex ea causa tibi eam non tradiderit, eo tamen ipso quod patitur tuum esse, statui tibi acquiritur proprietas, perinde ac si eo nomine tibi tradita fuisset." Just. Inst. lib. 2, tit. 1, s. 43.

by the vendee, are sufficient to vest the property in him without actual removal of it, even as against creditors of the vendor.

43. *Bona fide* sale of bricks lying in a yard, with a lease of the yard to the vendee, the plaintiff, till a sale and removal of them, and a private agreement that the vendor might re-purchase and sell them on his own account, or sell them on condition of first paying or securing to the vendee the amount of his claim, or the value of what were sold. The bricks were not removed. There was no proof of the yard's being used after the sale, in making other bricks, or for any purpose, except keeping the bricks of the vendee and vendor. Possession was duly delivered before witnesses. The nature of bricks is such, that they cannot be moved without expense and loss; and it is an unusual proceeding to remove them before a sale, or to place them in a warehouse for sale, on account of the expense and damage likely to be incurred. Held, the sale was valid against creditors of the vendor. The yard was not like a house or warehouse, which might be constantly occupied, or the key of it kept, by the vendee or his agent. The vendor gained no false credit by the transaction, because the vendee's possession was visible and notorious. The vendor's authority to sell, under the agreement, was not inconsistent with the vendee's title, for it involved no right in the former to interrupt the possession or divest the property of the latter. The bricks were not delivered to the vendor to sell, but the agreement was merely for a re-purchase, by which no creditor or purchaser could be deceived, because the vendor had no possession. In order to ascertain the terms of the vendor's agency, the vendee or his agent must be applied to.(1)

44. One A married the daughter of the plaintiff, being a widow, went to live in her house, and assumed the management of her family. A, becoming insolvent, broke up the establishment, sold the carriage, discharged the servants, &c., and surrendered the management of the household to the plaintiff, who afterwards exercised the exclusive control, and paid all the expenses, of the family. The furniture still continued in use, except the plate, which was boxed up. The plaintiff lent to A his notes to a large

(1) *Allen v. Smith*, 10 Mass. 308.

amount, payable at different periods, A covenanting to pay them at maturity; in consideration of which A gave the plaintiff a bill of sale of his furniture and plate, the value of which did not equal the amount of the debt. Held, the facts showed a transfer of possession, which rendered the sale valid against creditors of A.(1)

45. Upon the same principle, where an agent of the vendee is in possession, no delivery is necessary. Thus, A, a commission merchant, sold goods of B to C, and the same day bought them back from C at a reduced price on his own account. Discovering that they were not of the quality warranted by B, A charged them back to B, with his previous consent. Held, the property vested in B without delivery. The possession of the factor was that of the principal.(2)

46. *Bona fide* indorsement and delivery of a bill of lading pass the property in the goods, if so intended by the parties; like a delivery of the goods themselves.(3)

47. Mere indorsement of a bill of lading, without delivery of it to the assignee or some third person for his use and with his assent, does not pass a title. But, it is said, delivery without indorsement, if the cargo is by its terms to be delivered to a certain person, constitutes a valid transfer, subject to the vendor's right of reclaiming the goods, upon non-payment, before actual possession by the vendee.(4)

48. It seems, the mere putting of a bill of lading into the Post Office, directed to the vendee at a distant port, is a sufficient delivery to take precedence of a subsequent attachment.(5)

49. The plaintiff, a trader in London, made the following agreement with the defendant. "October, 11, 1833. Sold to G & Son, for account of A & Co., two hundred firkins of M & Co's. Sligo butter, at 71s. 6d. per cwt; free on board. Payment, a bill at two months from the date of landing. To be shipped this month," &c. The butters were not shipped un-

(1) Ludlow v. Hurd, 19 John. 218.

(2) Holly v. Huggefords, 8 Pick. 73.

(3) Newsom v. Thornton, 6 E. 41.

(4) Buffington v. Curtis, 15 Mass. 528. Walter v. Ross, 2 Wash. C. C. 283.

(5) Buffington v. Curtis, 15 Mass. 528.

til the following month, but the defendant waived this condition; and accepted, the invoice and bill of lading, indorsed to him. The property was lost upon the voyage, and the plaintiff brings an action for goods bargained and sold, long after the property in the ordinary course would have been landed, and the two months' credit expired. Held, the action might be maintained. The invoice and bill of lading passed the property to the defendant. The condition of the contract was waived, and therefore was as if it had never existed. The provision for making payment by a bill at two months from the landing merely specified the date of payment, but did not render the landing a condition precedent of the defendant's liability. Nothing being left to complete the contract, this action would lie, and, it seems, even an action for goods sold and delivered. Nor was it necessary to set out the contract as conditional, as it would have been if made by deed.(1)

50. A, residing at Providence, being indebted to B at New York, and B having demanded payment, A informed him that he (A) had ordered a balance of funds in the West Indies to be sent to B, and directed B to give him credit therefor. A's agent shipped the funds, consisting of doubloons, in a general ship, consigned to B, and forwarded to B a bill of lading, stating them to be on the account and at the risk of A. Before arrival of the doubloons, A became insolvent, and assigned all his property to trustees for the benefit of other creditors. Upon arrival of the doubloons, they were claimed both by the assignees and by B. The ship-master files a bill of interpleader. Held, B had a specific lien, not affected by the assignment.(2)

51. A, residing at Boston, having ordered certain goods from B at Liverpool, B shipped them in a general freighting vessel, which was consigned to B and designated by A. A bill of lading was obtained by B, by which the goods were to be delivered to A. B having withheld the bill of lading from A, and afterwards enclosed it with an invoice in a letter to his, B's agent, with directions to deliver it to A only on condition of his pay-

(1) *Alexander v. Gardner*, 1 Scott, 630. 1 Bing. N. R. 671.

(2) *Clark v. Mauran*, 3 Palge, 373.

ing for the goods; held, that after the above facts, which seemed to constitute a sale and constructive delivery, B had no power thus to make the delivery a conditional one and deprive A of his title.(1)

52. A shipped goods to B, according to the order of the latter; sent a bill of lading indorsed, making the goods deliverable to order or assigns; and drew a bill on B for the price. The bill was not accepted, and the captain of the ship refused to deliver the goods. B brought an action of *trover* against the captain, and recovered a judgment against him. Held, A might sustain an action against B for goods sold and delivered. The delivery was complete, as between A and B, when the goods were put on board the ship. The transaction was in principle the same, as if, after delivery into the warehouse of the vendee, the vendor had retaken the goods. He would be liable for a tort, but might still maintain a suit for the price. So in this case, the detention by the captain, even though done by collusion with A, was no defence to this suit. B had claimed the goods in his suit against the captain, as his property; and recovered their value, as well as damages for detention; which claim could be sustained only upon the ground that the property passed when the goods were shipped.(2)

53. Where a bill of lading is signed before the goods specified therein are either shipped or purchased, and goods are afterwards shipped, before the vessel sails upon the intended voyage, as and for the goods referred to; as against the shipper and master, the bill of lading operates by relation and estoppel; and the consignee, who receives it and accepts drafts upon the consignment, gains a good title.(3)

54. Where property sold is in possession of a third person, giving notice to the latter of the sale is a sufficient delivery, more especially if followed by some act on his part indicating a recognition of the transfer. Thus, A purchased sheep in the possession and keeping of B. He notified B of the purchase, and requested him to act for himself (A) in selecting the sheep,

(1) *Stanton v. Eager*, 16 Pick. 467.

(2) *Groning v. Mendham*, 5 M. & S. 189.

(3) *Rowley v. Bigelow*, 12 Pick. 307.

and to receive and keep them for him, to which B assented. Soon afterwards, the selection was made, the vendor delivered the sheep to B, who marked them with the name of A, and kept them as before, till attached by a creditor of the vendor. Held, they were not liable to attachment.(1)

55. A gave to B, as security, an absolute bill of sale of a chaise in possession of C, and of other property in possession of A himself. There was no change of possession, but notice of the sale was given to C, who agreed to keep the chaise for B. Held, there was a sufficient delivery of the chaise, as against A's creditors; and that the sale was valid in regard to this, though it should not be in regard to the rest of the property, unless fraud in fact was proved, which was a question for the jury.(2)

56. In case of a sale of chattels, which are in custody of a third person, for valuable consideration, with an order upon the latter and notice thereof; the title passes, whether he obeys the order and delivers the property, or claims to hold it by some title or lien.(3)

57. But merely leaving goods with a third person, to be called for by the vendee, is not of itself a delivery.

58. The plaintiff left certain goods with A, requesting him to deliver them to the defendant, when called for. They were not called for, but remained in A's possession. Held, there was no delivery of the goods, and an action for goods sold and delivered did not lie.(4)

59. Where the vendor and vendee are tenants in common, no delivery is necessary; the possession of the former being that of the latter also.

60. The plaintiff advanced to one A the materials for constructing two carding-machines, A agreeing that the plaintiff should own a share in them proportioned to such advance. Afterwards, having sold one of the machines, A gives the plaintiff a writing to secure him in the property and possession of the other, authorizing him to sell it, re-pay himself for his advance, and

(1) *Barney v. Brown*, 2 Verm. 374.

(2) *Spaulding v. Austin*, 2 Verm. 555.

(3) *Plymouth Bank v. Bank of Norfolk*, 10 Pick. 469.

(4) *Hart v. Tyler*, 15 Pick. 171.

account with A for the surplus. The plaintiff thereupon gave A a receipt in full for his advance. The machine was in the house of one B, whence it could not be removed without being taken in pieces and injured, and no formal delivery was made of it. B, having a claim against A, attaches the machine as his. Held, the plaintiff and A under the original agreement were tenants in common, and no delivery was necessary to transfer the share of the latter to the former.(1)

61. The mere act of extending his hand over the property by the vendee, followed by the vendor's borrowing it for a particular use, and immediately taking it away, has been held not to be a delivery.

62. A, having negotiated with B to purchase of him a yoke of oxen, extended his arm over one of them in the act of measuring, and said he would pay the price demanded. B replied that he might have them, but at the same time borrowed them for the purpose of hauling a load of timber, with the agreement to use them in no other way. Held, there was no legal delivery, neither earnest being paid, nor a memorandum signed, and that no title had vested in A. There was nothing in the circumstances of the case, to show any departure from the general rule, that payment must precede delivery. The application made by B, was merely an intimation that he was not then ready to part with the cattle; and though his asking to borrow them seemed to imply that they were considered as belonging to A, yet this inference must be qualified by the accompanying acts and declarations. The true import of what passed between the parties was, that B knew the offer of A was no engagement to receive the cattle at any future time, and a request that the bargain might not be defeated by his using them, but that A would accept them afterwards. There was nothing to show any intention of giving credit. If the property had passed, B might maintain an action for the price; the cattle would have been in his hands at the risk of A, and upon A's death have vested in his administrator; which clearly was not the case.(2)

63. Under some circumstances, there may be a legal delivery,

(1) *Beaumont v. Crane*, 14 Mass. 402.

(2) *Philips v. Hunnewell*, 4 Greenl. 315.

though the vendor retain possession as before the sale, and merely by some writing or otherwise recognize its existence and validity.

64. Thus, where the vendee of goods gives his note for the price, and the vendor agrees that they may remain on his premises, and afterwards affirms the sale; this constitutes a sale and delivery, and the vendee may maintain trover for the goods.(1)

65. So if a man bargains for the purchase of goods, and desires the vendor to keep them in his possession for an especial purpose for the vendee, and the vendor accepts the order, this is a sufficient delivery.(2)

66. More especially is this the law, where the vendee subsequently obtains possession, though without notice to the vendor.

67. Sale of cattle; no earnest paid, nor memorandum signed; the cattle to remain with the vendor at the risk of the vendee till called for. The vendee having taken them away without notice to the vendor, held, this was a sufficient delivery under the Statute of Frauds, being an act of ownership on the part of the vendee in confirmation of the bargain.(3)

68. The plaintiff, who kept a livery-stable and dealt in horses, asked from the defendant 180 guineas for two. The defendant offered a smaller sum, which was refused, but afterwards sent word that the horses were his, but as he had no servant nor stable, the plaintiff must keep them at livery for him. The plaintiff removed the horses to another stable. Held, this last circumstance was immaterial, but without it there was a complete delivery to the defendant, and an action for goods sold and delivered would lie against him.(4)

69. Goods were sold, to be paid for in thirty days, and if not taken away at the end of that time, warehouse rent to be paid

(1) *Atkinson v. Barnes*, Lofft, 326.

(2) *Elmore v. Stone*, 1 Taun. 458.

(3) *Vincent v. Germond*, 11 John. 283.

(4) *Elmore v. Stone*, 1 Taun. 457.*

* Of this case it has been said, that it goes as far as any case ought to go, and I think we ought not to go one step beyond it. I must say, that I doubt the authority of that decision. Per Bayley, J., *Howe v. Palmer*, 3 B. & Ald. 321.

by the vendee. Held, the property vested in the latter immediately upon the sale, the provision for stowage being solely for his benefit.(1)

70. The plaintiff advanced money to one A, who, as security, gave an order upon the defendant for a quantity of malt, and the defendant acknowledged in writing that he held the property for the plaintiff. Held, the defendant was estopped to deny, that the malt belonged to the plaintiff.(2)

71. An upholsterer sold household goods, but still had a servant in the house where they were sent, and the purchaser had not taken actual possession. Whether there was a complete delivery, qu.(3)

72. A certificate given by the vendor that he holds the goods in storage is so fully equivalent to actual delivery, that he has no greater right of lien, nor is the sale any more subject to be rescinded, as against purchasers from the vendee; than if the property had come into the manual possession of the latter. Thus, the defendant gave one A, the vendee, such certificate, together with a bill of parcels, receipted, A giving his negotiable note for the price. A offered to cancel the contract, if the defendant would return the note, and the latter agreed so to do. The note was then in a bank, having been discounted for the defendant. Some days afterwards, the defendant tendered it to A and requested him to cancel the contract. A in the mean time had assigned the goods to the plaintiffs, his creditors, with notice of the conversation as to the cancelling of the agreement. The plaintiffs bring trover for the goods. Held, the defendant was estopped to deny that he had the goods, and could not offer parol evidence to the contrary; that the property had vested in A, subject to no lien by the defendant for the price; that the contract was not rescinded, having been executed; that there was no re-sale to the defendant, but at most, a mere conditional agreement to re-convey, which was void by the Statute of Frauds. The facts, without the aid of parol evidence, showed a sale and delivery by the defendant to A, and an assignment by A to the

(1) *Phillimore v. Barry*, 1 Camp. 513.

(2) *Stonard v. Dunkin*, 2 Camp. 344.

(3) *Hunt v. Stevens*, 3 Taun. 113.

plaintiffs. If the plaintiffs rights had not intervened, A might have re-sold to the defendant unconditionally, taking an indemnity against the note; and the property would thereby have re-vested without delivery, being already in the defendant's possession.(1)

73. Contrary to the general tenor of the above cases, it has been held in New York, that an agreement with the vendor respecting storage, and delivery by him of the export entry to an agent of the vendee, do not amount to constructive delivery, or afford an indicium of ownership.*(2)

74. The general principle is, that a delivery of any part of property sold under an entire contract, is a virtual delivery of the whole, and binds the bargain under the Statute of Frauds, unless there be an agreement or understanding to separate a part.(3)

75. In case of an entire contract to deliver a number of articles at a certain time and place, the vendee is not bound to receive a part of them only, nor to pay for a part, though delivered, if willing to accept and pay for the whole. But if he accept a part, this is a disaffirmance of the entirety of the contract, and he is bound to pay for such part.†(4)

76. Agreement for the sale of one hundred sacks of flour. A part of them were delivered, and payment was tendered for the whole. Held, the vendor could not maintain an action for the price of those which were delivered.(5)

77. Where there is an entire contract to deliver a large quan-

(1) Chapman v. Searle, 3 Pick. 38.

(2) Bailey v. Ogden, 3 John. 399.

(3) Parks v. Hall, 2 Pick. 206.

(4) Roberts v. Beatty, 2 Penns. 63.

(5) Walker v. Dixon, 2 Star. 281.

* Where a vendee, after an executed sale, leaves the goods with the vendor, he is liable by an implied assumpsit to pay the expense of keeping. *Roe v. Martin*, 2 Cow. 417.

† Where several chattels are sold together for one entire price, which is paid, and a part of them are delivered to and retained by the vendee, but the vendor refuses to deliver the rest; the vendee cannot recover any part of the price as *money paid* or *money had and received*, but must sue upon the contract. *Miner v. Bradley*, 22 Pick. 457.

tity of goods, consisting of distinct parcels, within a specified time, and the seller delivers a part of them, he cannot before the expiration of the time sue for the price of such part, because the vendee has the right of returning them in case the contract is not fully complied with. But if the vendee retains the part delivered after the expiration of the specified time, he is liable to an action therefor, though the remainder be not delivered.(1)

78. Where the vendee accepts a part of the property sold, but not within reasonable time, or certainly within the time agreed upon for taking the whole, such acceptance does not take the case out of the Statute of Frauds.(2)

79. Where the purchaser of several articles at the time of sale, writes his name upon one of them, intending to denote his having purchased it, and appropriate it to his own use, this is equivalent to delivery of that article, but not of the others.(3)

80. Under a contract which was void by the Statute of Frauds, the defendant was to have from the plaintiff 12,000 bricks at the rate of four dollars per thousand, to be received at the plaintiff's kiln within one month. After the expiration of the month, the defendant received 800 of the bricks, informing the agent of the plaintiff, who delivered them, that he would take the remainder on the following week, to which the agent assented. The defendant did not call for the rest of the bricks, nor did the plaintiff separate the requisite number from the kiln. Held, the plaintiff might still maintain an action for the price of the 12,000; the new agreement being made certain by reference to the former one, as to quantity and price, and not within the Statute of Frauds. The bargain and sale was complete by delivery of a part of the property. The vendor was to do no further act, till the vendee should call upon him. Hence, the property had vested in the latter. The case is the same in principle, as if the plaintiff had sold, from a kiln of 100,000 bricks, 10,000 to one person, the same number to a second, and the same to a third, and delivered one brick to each in token of the

(1) *Oxendale v. Wetherell*, 9 B. & C. 387, 8. *Waddington v. Oliver*, 2 N. R. 61.

(2) *Damon v. Osborn*, 1 Pick. 476.

(3) *Hodgson v. Le Bret*, 1 Camp. 233.

whole; in which case, the whole would undoubtedly pass to the respective vendees.(1)

81. A takes an assignment of property from B, to secure a debt; agreeing to sell the property, and, after paying himself, to pay over the surplus to B. Having been paid in money and securities, A verbally agrees to give up the goods, and accordingly does give them up, excepting a quantity of wine and vinegar. The wine was in a loft held by A under a lease from B. A agrees to come and surrender the lease and give up the key, but fails to do it; and B takes possession of the loft and the wine, without A's knowledge. Before the lease and key are delivered up, a part of the securities fail. Held, the facts showed a re-sale to B, and A had no lien upon the wine and vinegar, because all the goods had been constructively delivered, and the actual possession taken of the wine was authorized by the contract. No demand of the key was necessary, because A had agreed to deliver it; and he could not be allowed to take advantage of his own wrong.(2)

82. The rule above stated, that delivery of a part is a constructive delivery of the whole, applies, although the goods are taken a few hours subsequent to the sale. Thus the plaintiff, in the forenoon, sold to the defendant a lot of logs lying together at the distance of a mile. In the afternoon, the defendant sent and converted to his own use a part of the logs. There was no other delivery, nor any payment. Held, the plaintiff might recover the price of the whole quantity sold.(3)

83. Where one contracts for the sale and delivery of a large quantity of goods upon their arrival at a certain port, and a part of them only arrive; he is not bound to deliver such part. The vendee is not bound to receive a part, and the obligation of the parties must be reciprocal.(4)

84. Under this head may properly be considered the legal effect of delivering a *sample* of the goods sold. The general rule upon this subject is, that delivery of a *sample*, which is no part

(1) *Damon v. Osborn*, 1 Pick. 476.

(2) *Parks v. Hall*, 2 Pick. 206.

(3) *Davis v. Moore*, 1 Shepl. 424.

(4) *Russel v. Nicoll*, 3 Wend. 112.

of the commodity itself, is not sufficient to take a case out of the Statute. If it is a part of the commodity, this is held an execution of the bargain, and dispenses with any writing. The distinction is, that in the latter case the sample is taken for the vendee's own use, as part of the bulk, not merely to guide his judgment, but to give him possession of the thing itself. It is a *part delivery*.(1)

85. The delivery of a sample, part of the commodity itself, is sufficient, though made in part *alio intuitu*.(2)

86. Delivery of goods sold may be conditional as well as absolute. Actual delivery does not *per se* transfer the actual property in goods. There must be a *consummation of the contract*.(3)

87. Where a sale is made on condition of payment upon delivery, and the vendor allows the vendee to take a part of the goods without payment, this is not an entire waiver of the condition. Hence, the vendee can maintain no action for non-delivery of the rest.(4)

88. Upon a cash sale of goods, the vendor may refuse to deliver till payment. But delivery without payment is a waiver of this condition, the property passes, and *trover* cannot be sustained by the vendor, though payment be not made afterwards. Otherwise, it seems, where the goods have been obtained by fraudulent contrivance of the vendee.(5)

89. So where a vendee has agreed to give notes for the price, but the vendor delivers the goods without requiring such notes or annexing any condition to the delivery; this is a waiver of the above agreement, and the property passes.(6)

90. But, it is said, where there is a conditional bargain for the sale of goods, and an immediate delivery, under the expectation that the stipulated security will be produced, or payment soon made, but no declaration that the delivery is conditional; the sale will not be held absolute, because there is an under-

(1) *Talver v. West*, Holt, 178. *Klinitz v. Surry*, 5 Esp. 267.

(2) *Hinde v. Whitehouse*, 7 E. 570.

(3) *Mason v. Lickbarrow*, 1 H. Bl. 362. 17 Mass. 611.

(4) *Payne v. Shadbolt*, 1 Camp. 427.

(5) *Chapman v. Lathrop*, 6 Cow. 110. 3 Fairf. 476.

(6) *Lupin v. Marie*, 6 Wend. 77.

standing that the vendee will act honestly, and furnish the security, as soon as he can have opportunity to procure it. If this rule were not adopted, auction and other sales must be much embarrassed. Moreover, no one is wronged by it, unless the vendee obtain credit upon the strength of the goods, or sell them to an ignorant purchaser, in which case, the vendor would be supposed to have delivered them for the purpose of trading.(1)

91. It will be seen from the following cases, that the authorities upon this subject are somewhat contradictory. They all agree, however, in making a distinction between the right of the vendor to avoid the sale for breach of condition, as against the vendee himself, or those creditors of the vendee whose claims arose before the sale; and creditors who trusted him after the sale, and upon the credit of the goods sold.

92. A ordered from the plaintiff a piano-forte, for exportation, to be delivered at the house of the defendant, a packer, and paid for in ready money. The plaintiff's servant delivered the piano-forte at the defendant's house, and demanded the money. The answer was, that A had given no orders for that purpose, and that the defendant was from home. The servant stated, that payment was to be made before delivery, and, upon that understanding, left the instrument. The defendant afterwards refused to restore it, and shipped it for A without payment. In trover by the plaintiff, held, the delivery to the defendant was only conditional; he remained a trustee for the plaintiff, had no right to deliver the instrument to A till payment, and was liable to this action.(2)

93. November 22, A applied to the plaintiff to purchase goods. Before delivery, a memorandum was made in the plaintiff's book, that \$150 must be paid down, and the balance of the price in the following spring. The same day, in the afternoon, a part of the goods were sent to the wharf appointed, and on the day following, the rest, marked with the name of A. On the 23d, in the forenoon, A called for a bill of the goods, and paid \$75. The clerk thereupon referred him to the plaintiff, to know whether the whole \$150 would be claimed. The plain-

(1) *Smith v. Dennie*, 6 Pick. 266. 2 Kent, 491.

(2) *Loeschman v. Williams*, 4 Camp. 181.

tiff then came in, and, during the conversation, notice was given that the property had been attached by a creditor of A, whose debt was incurred before the sale. The plaintiff thereupon remarked that it was no sale, because the agreement had not been complied with. A said, he did not know that it was a sale. He also said, afterwards, that the attachment was invalid, because the goods had been previously sold to a third person. Upon this representation, the plaintiff commenced an action of assumpsit against A for the price of the goods, and caused them to be attached as his. This suit was not prosecuted, and subsequently, two and a half months after the sale, the plaintiff brings the present action of replevin against the attaching officer. The jury, in their verdict for the plaintiff, found a conditional delivery. Held, this was a right verdict, no bill of parcels having been made out; that the long delay in bringing this action, and the commencement of the suit for the price, furnished strong evidence of a waiver of the condition, and would have justified a verdict for the defendant, but were not conclusive; that, as the contract was at the first conditional, the plaintiff was not bound to show any rescission of it, or to return the \$75, and that a new trial should not be granted.(1)

94. Sale on credit, the vendee agreeing to give certain bills for the price. The goods were shipped by his order, and no objection made by the vendor, that the condition was not complied with. Held, the property was liable to attachment by the vendee's creditors.(2)

95. The plaintiff sold goods to A, on condition of his furnishing a surety for the price. The captain of A's vessel, in which the goods were to be carried, afterwards called on the plaintiff, and inquired whether he had goods to be forwarded to A. The plaintiff replied that he had, and they would be ready when sent for. They were accordingly delivered to the vendee's order, nothing being said respecting security, either to the captain or the drayman. While the goods were at the wharf, a part having been put on board the vessel, the plaintiff went to the wharf, and told the captain that the goods should not be laden till security

(1) *Marston v. Baldwin*, 17 Mass. 606.

(2) *Carleton v. Sumner*, 4 Pick. 516.

was furnished, and that until then he should consider them as his property. Held, the captain was the agent of the vendee, who was therefore bound by his receiving the goods, and thereby assenting to the plaintiff's declarations at the time; and that the plaintiff should hold the property, against creditors whose claims accrued before the vendee came into possession. It would be otherwise with regard to creditors who became such after his possession, and in consequence of a false credit thereby gained; or *bona fide* purchasers for valuable consideration from the vendee.(1)

96. Goods were sold, on condition of the vendee's giving a note with a sufficient indorser for the price. The property was taken by the vendee, without objection from the plaintiff, the vendor, the clerk of the latter telling him, that if the indorser named were not satisfactory, another one must be procured. The person named was rejected, and no other obtained. Held, the vendee gained no title to the goods; that no express declaration of conditional delivery was necessary, provided such appeared to be the understanding of the parties.*(2)

97. The plaintiff sold personal property, on condition of the vendee's giving an indorsed note for the price. Delivery was made without express reference to the condition; the vendee kept the goods eight days, and they were then attached by his creditors, (whether they were creditors prior or subsequent to his obtaining the property, qu.) the plaintiff, in the mean time, having claimed neither the note nor the property, a neglect, of which

(1) *Hussey v. Thornton*, 4 Mass. 405.

(2) *Whitwell v. Vincent*, 4 Pick. 449.

* In the same case it appeared, that the vendee sold the goods to one C, taking C's negotiable note for the price, and transferred this note by way of security to the defendant, a creditor, who had notice of the facts. The creditor, upon demand of the plaintiff, refused to deliver him the note. Held, while the note remained unpaid in the creditor's hands, the plaintiff could not maintain *assumpsit* against him for the amount, because by bringing the action he affirmed the original sale. The first vendee having re-sold the goods, taking a negotiable note, the plaintiff might waive the tort and bring *assumpsit* against him for the proceeds. But the creditor had no concern with the sale by the first purchaser. He only took the note as security. No action would lie against him without a demand, and, after demand, none but *trover*. If he had sold the note, and if the note belonged to the plaintiff, *assumpsit* would lie. *Ib.*

no explanation was given upon the trial. Held, these facts showed a waiver of the condition; that the attachment must prevail; and a verdict to the contrary be set aside as against evidence. The vendor might have insisted upon the condition one day after the sale, or two days, or any greater number, if the delay were satisfactorily explained; and the question of reasonable time is for the jury.(1)

98. Where there is a contract for a sale *in futuro* or on performance of a condition, and a further stipulation that in the mean time the vendee shall have possession for a particular purpose, and he takes possession accordingly; the sale is not executed, nor the property changed, till the act is done, or the condition performed.

99. Thus the plaintiff, in the month of May, agreed in writing to sell to one A, on or before September 1, a brick-pressing machine for \$200, to be paid on delivery, and that A might use it till that time. A agreed to pay the plaintiff \$200 on or before the time mentioned; and, in consideration of the making and delivery of the machine, gave the plaintiff his negotiable note, of even date with the agreement, for \$200, payable on or before September 1, with interest from date, unless paid at the time. Each party bound himself to performance under a penalty. A possessed and used the machine from a time previous to September 1, till the following February, when it was attached by one of his creditors, the note having been only in part paid. Held, no title had vested in A. The giving of the note was only *prima facie* evidence of payment, liable to be rebutted by contrary proofs, which were furnished by the facts of the case. The note was given for the money; and the money was to be paid on delivery of the machine; of course the note was to be paid upon such delivery. Nor did it make any difference, that the contract provided for no return of the article; because it was expected that the note would be paid, and, if not, the title would re-vest by operation of law.*(2)

(1) *Smith v. Dennie*, 6 Pick. 262.

(2) *Reed v. Upton*, 10 Pick. 524. (See 9 Ib. 156.)

* Sale and delivery of a wagon, on condition that the vendee shall take and use it,

100. When goods sold are to be delivered at a distance from the vendor, and no charge is made by him for the transportation ; they become the property of the purchaser, as soon as forwarded by the vendor.(1)

101. In case of an order to send goods by a carrier, without naming any particular one, delivery to a carrier is in law delivery to the vendee. He only can sue for any injury to the goods, and they are at his risk. The only remaining right of the vendor is that of stoppage *in transitu*.(2)

102. It seems, a delivery, by the order of a purchaser, to a particular stage-coach, to be sent direct, or left till called for, is a delivery to the party. So where there is a general order for carriage of the goods to a certain place, and the conveyance adopted is the only one existing, or the usual one ; or that by which other goods have been previously sent by the same vendor ; or where the vendee assents to the mode adopted, upon being informed of it. In all these cases, the goods are at the risk of the vendee during the passage, and an action lies for goods sold and delivered. The carrier is the vendee's agent to receive and accept the goods.(3)

103. Where a merchant in the city is authorized by his correspondence and course of dealing with one in the country to send him goods without a special order, delivery to a carrier, though others are delivered at the same time, for which a special order was sent, vests the property in the consignee ; and, it seems, the vendor cannot maintain an action against the carrier for losing the goods.(4)

(1) *Fragano v. Long*, 4 B. & C. 223.

(2) *Dutton v. Solomonson*, 3 B. & P. 582.

(3) *Whiting v. Farrand*, 1 Conn. 60. *Per Garrow, B. Anderson v. Hodgson*, 5 Price, 635. *Vale v. Bayle*, Cowp. 294. *Hart v. Sattley*, 3 Camp. 528.

(4) *Morberger v. Hackenberg*, 13 S. & R. 26.

and become the owner of it upon payment of the price ; and, in case he does not make such payment, then to pay for the use of the wagon. Held, the vendee stood as lessee of the property, till the vendor demanded either the wagon or the price. Hence the vendor could not, without a previous demand, bring *trover* against an officer who had attached and sold the wagon as the vendee's property. *Fairbank v. Phelps*, 22 Pick. 535. In the same case, the vendor having after the sale demanded payment, but subsequently received a part of the price ; held, he thus impliedly waived his demand for further payment at the time, and confirmed the sale subject to the condition. *Ib.*

104. A, residing in Wales, ordered goods from the traveler of B, residing in London. No method of transportation was prescribed. Held, it should be presumed that they were to be sent in the most usual and convenient way, and therefore, upon delivery to a carrier in London, a cause of action for the price arose there.(1)

105. Where goods are purchased, selected, boxed, the name and residence of the vendee marked upon them, and put on board a vessel appointed by the vendee, and at his expense and risk, to be forwarded to him; the property in the goods passes to the vendee, although an invoice be not delivered, nor security given for the price, and though the receipt given by the master of the vessel to the vendor still remain in his hands; no agreement having been made that the goods should be retained till security was given, and the receipt being a mere voucher showing that the goods have been forwarded according to order, and being given *after* delivery, consequently not capable of controlling its effect.(2)

106. A, a merchant at Naples, gave an order to B at Birmingham, to send him certain goods upon insurance being effected; the terms, three months' credit from the time of arrival. B marked the goods with A's initials, sent them by canal to Liverpool, and effected insurance upon them, declaring the interest to be in A. At Liverpool, the goods were delivered to the owner of a ship bound to Naples, and were damaged through his negligence. Held, the property in the goods vested in A, when they were forwarded from Birmingham, and that their arrival at Naples was not a condition of his liability to pay. Hence, in an action brought by A against the ship-owner, judgment was rendered for the plaintiff.(3)

107. In June and July 1830, A ordered a quantity of corn from B in Russia, directing him to draw on C for the price. A chartered a ship from C, to transport the cargo. July 28, A countermanded his order. August 8, B informed A, that he had purchased a cargo for the ship, and would send it as soon

(1) Copeland v. Lewis, 2 Star. 33.

(2) People v. Haynes, 14 Wend. 546.

(3) Fragano v. Long, 4 B. & C. 219.

as possible, directed to the care of C, hoping he would approve this course notwithstanding his having countermanded the order. The corn was shipped, and a letter written, informing A of it, and that B had sent an indorsed bill of lading to C, and had drawn upon C for a part of the price, and on A for the balance. B enclosed an unindorsed bill of lading to A, together with an invoice, representing the corn as bought for his (A's) order and on his account. The bills of exchange enclosed in this letter were dishonored. B's agent then delivered the indorsed bill of lading to C. Oct. 2, A renewed his countermand of the order. November 24, the agent of B notified the agent of A, that he should retain the whole cargo for B. A afterwards applied for the corn, and the captain delivered it to his order, instead of delivering it to C, conformably to the bill of lading. For this act of the captain, B brings a suit against D, the ship owner. Held, the property vested in A, upon shipment of the goods, conditioned upon acceptance of the bills of exchange, which not being accepted, the property never vested, and that B should recover, not mere nominal damages, but the value of the cargo, at the time of delivery to A.(1)

108. A consigned goods to B abroad, ordered a return cargo, and sent his own ship to bring it back. The return cargo was delivered to the captain of A's vessel, B stating it to be on A's account, as if his own property, and ordering that it be delivered to him. The return cargo exceeding in value that sent by A, B drew upon him for the balance, sent the bills to his agent, with a blank bill of lading, and requested the agent, in case of non-acceptance by A, to indorse the bill of lading to C. The bills not being accepted, the agent accordingly indorsed the bill of lading to C. Upon arrival of the ship, C demanded the cargo from the captain, but he delivered it to A, who deposited it with D. B gave notice to D to hold the goods for him, and D consequently refused to re-deliver them to A. A brings an action of *trover* against D. Held, though the delivery of the cargo to the captain might have been conditional upon the acceptance of the bills of exchange, it was in fact absolute, and vest-

(1) Brandt v. Bowlby, 2 Barn. & Ad. 932.

ed the property in A ; but that A, having got possession under a claim of property in the goods, could not have retained them for payment of freight. Judgment for the plaintiff.(1)

109. One B agreed to sell the plaintiff, by bought and sold notes, from 500 to 700 barrels of oats, to be shipped by one J at Y and delivered at P. Soon afterwards, B wrote to the plaintiff, that room had been engaged in the G Packet for about 600 barrels on the defendant's account. The next day, the plaintiff sent instructions to his agent in London, to effect insurance for £400, upon oats sent per the G packet from Y to Southampton and P. J shipped 486 barrels in compliance with the above agreement, in the G packet for Southampton, and sent a bill of lading with a general indorsement to J's agent. The plaintiff insisting upon the vessel's going round to P, B sold the oats to C. The G packet having been lost, and the policy subsequently transferred by the plaintiff to B ; held, the plaintiff at the time of effecting the policy had an interest in the oats shipped on board the G packet, and therefore the insurers were liable, though the ownership was subsequently changed. No specific parcel of oats passed by the bought and sold notes, but B's letter to the plaintiff was an unequivocal appropriation of the oats shipped in the packet, and the instructions for insurance given by the plaintiff amounted to an adoption on his part of such appropriation. Concealment of the fact, that the packet was not bound to P, could not divest the plaintiff's property. He had the right to demand of B, either that the packet should come to P, or the oats be sent in some other way. The plaintiff insisted upon having these particular oats, and thereby acquired a legal interest in them.(2)

110. A ordered certain goods from the plaintiff, to be sent to a particular quay and left till called for, but named no particular carrier. It was not proved that A had received and accepted the goods, though they were sent according to order. A agreed to pay for the carriage. In an action for goods sold and delivered, the plaintiff having been nonsuited, held there was no sufficient evidence in his favor to justify the Court in taking off

(1) *Ogle v. Atkinson*, 5 Taun. 759. 1 Marsh. 323.

(2) *Sparkes v. Marshall*, 3 Scott, 172.

the nonsuit. A's agreement to pay for the carriage was held to be merely a part of the consideration and price of the goods.(1)

SECTION II.—NECESSITY OF DELIVERY IN RELATION TO CREDITORS, &c.

1. The general subject of *fraudulent sales* will be considered hereafter, in treating of the circumstances which render a sale of personal property void or voidable. It is proposed in the present connection, merely to speak of the necessity of *delivery*, or the effect of non-delivery, in relation to *creditors* of the vendor. The general rule of law is, as was stated in the first chapter, (pages 1, 2), that delivery is not necessary to complete the contract of sale, as *between the parties*; but that it is necessary to avoid the effect of a subsequent sale by the vendee, or seizure by his creditors. The reason of the rule is, as stated in a very early and leading case,(2) that where the donor continues in possession and uses the goods as his own; by reason thereof he trades and trafficks with others, and defrauds and deceives them; and further, that such possession is evidence of a *trust* for the benefit of the donor, and "fraud is always apparelled and clad with a trust, and a trust is the covert of fraud." In another case it is said, the retaining possession of property sold indicates a fictitious transaction; 1. Because it is inconsistent to buy and not take possession of an article; 2. Because the vendor hereby gains a false credit.(3)*

(1) *Anderson v. Hodgson*, 5 Price, 630.

(2) *Twyne's case*, 3 Co. 80. (1 Burr. 482.)

(3) *Ludlow v. Hurd*, 19 John. 218.

* Although the general principles of the common law avoid all fraudulent contracts, the law of *fraudulent conveyance* is founded chiefly upon an early English Statute—13 Eliz. ch. 5, which will be more particularly referred to hereafter. The provision in another important English Statute, (that of James), that where the "order and disposition" of property sold remains with the vendor, he shall be regarded as still the owner, is a part of the *bankrupt system*, and not applied to other cases, even in England; nor, in any case in Massachusetts, (or probably other states.) *Shumway v. Rutter*, 8 Pick. 447.

2. The construction given to this doctrine in some cases has been, that continued possession by the vendor is *per se fraudulent*, or conclusive evidence of fraud, against creditors. But it seems to be now well settled in England, and for the most part in this country, that such possession is a mere *badge of fraud*, or a circumstance tending to show *mala fides*, the effect of which may be rebutted by other evidence.

3. The cases upon this subject to be found in the books are very numerous, but, as they all tend to one and the same point, with few variations or modifications arising from specific circumstances, a few only will be cited at length. Some relate to absolute, and others to conditional, sales; and in general it is to be observed, that while in regard to the former, the form of the instrument implies an immediate taking of possession by the vendee, and the law therefore requires some *extrinsic* explanation of his failure to do so; a mere mortgage or conditional sale* imports, *primâ facie*, that the vendor may keep possession till breach of condition, and consequently his continued possession raises no presumption of fraud. Upon the same principle, where there is an express agreement in the instrument, whether absolute or conditional, that the vendor shall keep possession, or a lease to him from the vendee; as such possession thereby becomes consistent with the terms of the contract, the law does not consider it fraudulent.

4. A, being indebted to both the plaintiff and the defendant, March 27, offered the defendant a bill of sale of his personal property, including furniture and stock in trade, as security. The defendant consenting to accept such transfer, only on condition that he might take possession and make sale of the property, after fourteen days, in case of non-payment; A agreed to

* In Massachusetts, no mortgage of personal property is valid, except as between the parties themselves, unless the mortgagee take and retain possession; or the mortgage be recorded by the clerk of the town where the mortgagor resides at the time of making it. A similar provision was made in North Carolina in 1830. So in New-York, the like rule prevails. Also in Kentucky (1831), New Hampshire (1832), Georgia, (1827), Maryland, and probably other states. Mass. Rev. St. ch. 74, s. 5. 2 N. Y. Rev. St. 136, s. 5.

this proposal, made a bill of sale, and delivered a corkscrew in token of possession of the whole property, but continued in possession as before. April 17th, A died intestate, and the next day the defendant took possession of the goods and sold them. No letters of administration were taken out by any one. The plaintiff brings an action against the defendant as executor *de son tort*, and the question thereupon arose whether the bill of sale was valid. Held, inasmuch as it was to take effect immediately and not *in futuro*, the possession was inconsistent with the writing, and the latter therefore void.(1)

5. Certain household goods were conveyed to the trustees of a marriage settlement, but the settler remained in possession. Held, such possession was consistent with the nature and purpose of the deed, and did not therefore avoid it as against a creditor.(2)

6. A sold furniture to B, which was contained in a house occupied by A. B took a lease of the house from the owner, but received no possession of the furniture, and made no agreement that A should continue to use it. A afterwards removed to another place, took the furniture with him, and made additions to it of new articles. The consideration of the sale was, that B paid the debt due from A to a creditor who attached the furniture. Held, the transfer was void against A's creditors for want of delivery.(3)

7. A consigned to B a quantity of tobacco, to be sold, and the proceeds applied in payment of a debt due B. After arri-

(1) *Edwards v. Harben*,* 2 T. R. 587. 594 n. (6 E. 257. 5 Taun. 212.)

(2) *Cadogan v. Kennel*, Cowp. 432. (3 T. R. 618. 620 n.)

(3) *Shumway v. Rutter*, 7 Pick. 56.

* It is said, that the case of *Edwards v. Harben* has been frequently referred to, and acted upon as good law in subsequent cases; but in a very late case, Lord Chief Justice Dallas stated, that it had been often dissented from; and Mr. Justice Park said, that doubts had arisen with respect to the extent of the doctrine there laid down. On the other hand, the case is corroborated by the assent and support of Mr. Justice Lawrence. And it is said to have established the principle, never having been questioned, that if a conveyance of chattels is conditional, or provides that the vendor may retain possession, such possession is not fraudulent against creditors. Long on Sales, 112. 7 Bing. 583. 1 Brod. & B. 511. 1 Taun. 382.

val at the port of destination, but before any possession taken by B, the creditors of A seized the property. Held, by the House of Lords, (reversing the judgment of the Lord Ordinary and Court of Sessions,) that the title of B should prevail over that of A's creditors.(1)

8. A leased to B a farm and cattle, under the agreement that B should deliver him one half the produce and one half the increase of the cattle, and, at the end of the term, cattle of equivalent value. B remained on the farm several years, became a debtor to A, and in payment of the debt sold A all his interest in the cattle, and agreed to manage the farm as A's servant. This last sale was a secret transaction, B remaining as he was before, in order to prevent any alarm on the part of his creditors. Held, as to them the sale was void.(2)

9. A, having in the spring rented a farm from B for the ensuing season, let the growing grass to C, to cut and make hay, allowing him one half for his labor. C, having deposited most of the hay in a barn upon the land, purchased A's half of it, but left it in the barn. The farm was afterwards hired by D, who moved into the house in the ensuing autumn. A remained on the premises till the next spring, keeping a cow in the barn through the winter. In January, the hay was taken and sold on an execution against A, and C brings an action to recover damages for this taking. Held, he could not recover, the sale being void against creditors, for want of a change of possession.(3)

10. A, occupying a farm of the plaintiff under a lease, gave the plaintiff a bill of sale of certain cattle, and delivered them upon the farm, in payment of a part of the preceding, and the whole of the following year's rent. A to have possession of a part of the cattle, use them for working on the farm, and support them, allowing the plaintiff also to use them, whenever he (A) had no occasion for their services. The rest of the cattle

(1) *Hastie v. Arthur*, 2 Bell's Comm. 199, n. 1.

(2) *Trask v. Bowers*, 4 N. H. 309.

(3) *Beattie v. Robin*, 2 Verm. 181.

were to be pastured by A for the plaintiff, at the customary price. The cattle being attached by a creditor of A, the plaintiff brings an action against the officer. Held, possession by the vendor was only evidence of fraud, strong, but not conclusive; and, under the circumstances of this case, the plaintiff was entitled to recover.(1)

11. The plaintiff, having loaned money to A, sent his son to A to procure a bill of sale of his property, which was accordingly given. The son took possession of the property. The lease, however, of A's house, was not assigned, though the son remained in possession; but A still continued to occupy it and to act as master, and no notice of the transfer was given to the laborers employed, who were hired by the son, but received orders in A's name. In an action by the plaintiff against creditors of A for seizing the property; the jury found a verdict for the plaintiff, which the Court refused to set aside.(2)

12. Assignment of the furniture and other personal property in a tavern, as security for a debt, with a proviso that the grantee should take possession on failure of payment of any instalment, sell the property, &c., till which time the vendor might keep possession. Held, good against creditors.(3)

13. A vendee took from the vendor the following writing "A bought of B," &c. (enumerating the articles and prices.) "Received payment. B." The property was delivered, but returned to the vendor and afterwards attached as his. Held, the possession of the vendor was not conclusive evidence of fraud, and that, after a suggestion of fraud, parol evidence was admissible to prove the transaction a mortgage. The above instrument was not a *bill of sale*, but a *bill of parcels*, not stating the terms of the contract, but resembling a receipt, although, unexplained, it would be sufficient to pass the property.(4)

14. A gives a bill of sale to B, and becomes bankrupt, before

(1) Brooks v. Powers, 15 Mass. 244.

(2) Benton v. Thornhill, 7 Taun. 149.

(3) Martindale v. Booth, 3 B. & Ald. 505.

(4) Fletcher v. Willard, 14 Pick. 464.

possession taken by the latter. Held, the assignees of A might recover for the property against the assignees of B.(1)

15. A gave a bill of sale to B, but retained and used the property till B's bankruptcy. Six months after the sale, and with all practicable expedition, the assignees took possession. Afterwards, A also became bankrupt. Held, the assignees of A could not recover on account of the property; that although, by the terms of a conveyance, the vendee may take possession immediately, and yet delays for six months; such conveyance is still valid against third persons, unless their claims intervene between the sale and possession taken.(2)

16. A father gave to his daughter, who lived with him, and was of age, a female calf whose dam was dead, on condition of her bringing it up. She accordingly brought it up by hand. It was fed on the father's farm, and after it had grown up, its milk was used in his family, he making no charge for the daughter's board or the keeping of the cow, and she making none for her labor or for the milk. Held, there was a valid gift and delivery, as against creditors of the father.(3)

17. A mortgaged to B a horse, as security for a debt and future advances, and made a formal delivery, but remained in possession, and used the horse as his own; and the transfer was not known to persons in the neighborhood. A afterwards sold to C, *bona fide*, for valuable consideration, and without notice. Held, B might reclaim the property; that continued possession was consistent with the nature of a mortgage, until a breach, though not with that of a pledge.(4)

18. Where goods are sold, not being in possession of the vendor, but of a third person, who, being notified of the sale, consents to keep the property for the vendee, the sale is not fraudulent, though not accompanied by change of possession. Nor is it any proof of fraud, that the vendor, having authority from the

(1) *Mair v. Glennie*, 4 M. & S. 240.

(2) *Robinson v. McDonnell*, 2 B. & Al. 134.

(3) *Martrick v. Linfield*, 21 Pick. 325.

(4) *Lunt v. Whitaker*, 1 Fairf. 310.

vendee to sell or let the property, sold a part, let the rest, and received payment therefor.(1)

19. A change of possession, to render the sale valid against creditors, must be *bona fide* and substantial, not merely colorable.

20. A publican, becoming insolvent, assigned his furniture and stock in trade to his creditors. A servant of the assignees was put in possession, but the debtor and his wife carried on the business several weeks as before, having access to the till in which the servant deposited the money which he took from customers. Held, the sale was void against creditors.(2)

21. But where, after a sale, the vendor and vendee have joint possession of the property, the transaction is not fraudulent against creditors, unless they have also joint *control* of it. Thus, where one merely works about the shop in which the goods are, as an under-workman, this does not give him legal possession. The question is, who is at the head of the establishment. If a difficult one to settle, the possession is joint.(3)

22. Upon a sale of cattle, it is not conclusive evidence against the presumption of fraud, arising from the vendor's continued possession, that the purchaser had himself no farm or forage for them.(4)

23. Where a vendee takes possession at a time subsequent to the sale, but before the rights of creditors accrue by attachment or otherwise, he shall hold against creditors. Thus, A gave a bill of sale of a ship to B, who agreed in writing to reconvey on payment of a certain note. B took possession eight months after the sale, after which a creditor of A attached the ship. Held, B's title should prevail over the attachment.(5)

24. Where goods are sold on execution, continued possession by the debtor is not fraudulent against creditors, because the transaction is in its nature notorious, and the purchase *bona fide*. The rule, being founded on these reasons, does not apply

(1) *Harding v. Janes*, 4 Verm. 462.

(2) *Wordall v. Smith*, 1 Camp. 332. 1 Esp. 205. But see *Ry. & M.* 312.

(3) *Allen v. Edgerton*, 3 Verm. 442.

(4) *Jennings v. Carter*, 2 Wend. 446.

(5) *Bartlett v. Williams*, 1 Pick. 288.

to an auction sale made by a sheriff by agreement of parties, without advertisement, or any legal precept to warrant it.(1)

26. The question of fraud sometimes arises, where the vendor of goods is enabled to purchase them by the aid of the vendee, giving the latter a claim on them as security, or where the vendee himself is the nominal purchaser, but with the funds of the vendor.

27. A loaned money to B to purchase goods, taking a bill of sale of the goods as security; but B remained in possession. Held, such possession was not fraudulent against creditors.(2)

28. A, having purchased a public house, but being unable to procure a license, put B, an insolvent person, into the house, as his servant. B obtained a license, and A furnished the money to pay for it. Held, by a majority of the judges, that the goods in the house, furnished by A, were not liable to be taken by B's creditors.(3)

29. But where one sells goods, taking a mortgage back, it has been held, that the mortgagor's continuing in possession is fraudulent against creditors. Thus, A sold to B, taking notes and a mortgage as security, but B took and retained possession of the property. Held, the mortgage was void as against the creditors of B. The transaction could not be treated as a sale from A to B, which was not to be perfected or completed till performance of a condition. A's title accrued by the mortgage, and was in no way aided by his prior ownership. In Vermont, it has been always held, according to the common law, that a sale without change of possession is void against creditors of the vendor; and this principle applies to a mortgage given back to the vendor at the time of sale.(4)

30. Where a man conveys the same goods successively to two creditors, delivering possession to neither, and the subsequent grantee afterwards obtains possession, which the former takes from him; the latter grantee cannot maintain trespass, because,

(1) 4 Verm. 465. 2 Bos. & P. 59. 4 Taun. 823. 1 Star. 367. 8 Taun. 838. 4 B. & C. 652. *Batchelder v. Carter*, 2 Verm. 168.

(2) Bull. N. P. 258. 1 Ld. Ray. 286.

(3) *Dawson v. Wood*, 3 Taun. 256.

(4) *Woodward v. Gates*, 9 Verm. 358

though both transfers are void against creditors, yet they both bind the vendor, and the former grantee has the elder title.(1)

31. It seems, a creditor, with whose knowledge and consent a bill of sale is given, cannot avoid it on the ground of the vendor's retaining possession (2)

32. Where the property sold is of a nature which does not easily admit of a change of possession, the rule more especially applies, that the retaining of possession by the vendor is not a fraud upon creditors. Thus A mortgaged land, having upon it a windmill, which was not a fixture, a bargain and sale of the latter being inserted in the mortgage. Held, a change of possession was not necessary to protect the mill from creditors of A.(3)

33. A statute of New York provides, that in all cases arising under the statute, the question of a fraudulent intent shall be one of fact, not of law. Notwithstanding this provision, however, where there is no immediate delivery, upon a sale of personal property, nor any actual and continued change of possession, or satisfactory explanation of the want of it; the Court is bound to direct a verdict for the creditor who disputes the validity of the conveyance, and the jury are not authorized to pass upon the question of intention. Their only authority to do this, is where fraud is alleged, notwithstanding a change of possession.* (4)

(1) Baker v. Lloyd, Bull. N. P. 258.

(2) Steel v. Brown, 1 Taun. 381.

(3) Steward v. Lombe, 1 Brod. & B. 506.

(4) Stevens v. Whitmore, 19 Wend. 181.

* On the subject of this section, see, in addition to the authorities cited, 8 Taun. 675. 3 B. & C. 368. 2 Dana, 204. 3 Cow. 166. 3 Conn. 160. 5 Greenl. 96. 2 South. 738. 5 Rand. 211. 3 Dev. 146. 3 Yerg. 475. 2 N. H. 13. 1 Bai. 538. 4 Leigh, 535. 1 Cranch, 309. 3 Munf. 1. 17 S. & R. 17. 1 Wash. C. 38. 1 Halst. 55. 6 Aik. 158. 6 Verm. 521. 4 Mas. 321. 9 Wend. 198. 4 Binn. 258. 1 Penn. 57. 8 Greenl. 326. 5 Const. S. C. 125.

SECTION III.—EFFECT OF A SALE, WHERE ANY THING REMAINS TO BE DONE TO THE THING SOLD, BY THE VENDOR.

1. Where any thing remains to be done by the seller of goods, as between him and the purchaser, before delivery; the latter acquires no complete, present right of property, and cannot sustain *trover*.(1)

2. Bargain and sale of twenty tons of oil from a stock consisting of several large quantities in different vessels and at different places. The quantity sold was not separated from the rest. The vendee contracted to pay a certain rent to the vendor for storage, after the sale. Held, notwithstanding this last circumstance, the property did not pass. It was remarked, that the difficulty of regarding any specific part of property in bulk as transferred to the vendee, without an actual separation, is greater in the case of *liquids* than of *solids*, because the particles which compose the former are constantly changing their relative position.(2)

3. A, having a quantity of hemp in the hands of B, sold a part of it to C, payable by C's acceptance at a certain time, and fourteen days allowed for delivery. A gave C an order on B, to weigh and deliver the specified quantity to C. Within the fourteen days, A notified B not to deliver the hemp to C, it not having been weighed, and no acceptance given in payment; but B did deliver to C. A usage was shown, for the holder of an order to indorse it to his vendee, and he again to another purchaser, and so on, without any weighing of the hemp till actually taken. Held, this usage could give the indorsee no greater rights over the goods, than the indorser himself had; that the sale to C was incomplete, and A might maintain *trover* against him.(3)

4. A quantity of turpentine was sold in casks, at auction, at

(1) *Hanson v. Meyer*, 6 E. 627. *Dole v. Stimpson*, 21 Pick. 384.

(2) *White v. Wilks*, 5 Taun. 176.

(3) *Shepley v. Davis*, 5 Taun. 617.

so much per hundred weight ; the casks to be taken at a certain marked quantity, excepting the two last, from which the vendor was to fill up the rest before delivery, and which, consequently, were themselves to be sold at uncertain quantities. The purchasers to pay a deposit at the time, and the balance within thirty days, upon delivery ; and to have the privilege of keeping the property in the warehouse of the vendor for thirty days, free of charge, afterwards paying rent. The vendee employed the warehouseman, as his agent in relation to the turpentine. The warehouseman filled some of the casks from the two last, but left the bungs out, to give the custom-house officer an opportunity of gauging them. Before he could fill the rest, and within the thirty days, the turpentine was destroyed by an accidental fire. Held, those of the casks which had been filled had become the property of the vendee. Nothing remained to be done to them by the vendor ; but the vendee was merely to have them gauged, as necessary to a removal. The leaving out of the bungs for the purpose of gauging was done by the warehouseman as agent for the vendee, the gauging being his duty, and not the vendor's. But, on the other hand, the casks not filled still remained the property of the vendor. The contracts must be regarded as distinct, in relation to the distinct lots purchased. The action, being for money had and received, to recover the deposit, was sustained as to the casks last mentioned.(1)

5. A vendee agreed to purchase all the vendor's starch, lying at a certain warehouse, at so much per hundred weight, to be paid for by a bill at two months. The starch was done up in papers, and the weight not ascertained, but to be determined afterwards, and fourteen days allowed for delivery. The vendor gave the vendee a note addressed to the warehouseman, requesting him to weigh and deliver all the starch. The vendee having become bankrupt, held, that portion of the starch which had not been weighed did not pass to the vendee, but the vendor might reclaim it. Two things were necessary to the vesting of the property ; viz. payment of the price, and the weighing of

(1) *Rugg v. Minett*, 11 E. 210.

the article, upon which the amount to be paid depended. Whether, if the former only of these acts remained unperformed, delivery of part would vest the whole, might be questionable. The warehouseman had no authority to deliver the starch till it was weighed; much less had the vendee or his assignees authority to take it without consent of the former.(1)

6. Contract to sell a stack of bark at so much per ton. The vendee agreed to take and pay for it on a certain day. Afterwards, a part of the bark was weighed and delivered. Held, the portion unweighed did not pass, because the weighing must determine the sum to be paid. And even if it did pass, an action for goods sold and delivered could not be sustained, nor, it seems, an action for goods bargained and sold.* Although the subject-matter of the contract was ascertained at the time of sale,—viz. *all* the bark, yet it was to be purchased at so much per ton. The concurrence of the vendor was necessary in the act of weighing, and he was not bound to deliver, till this had been done. He might have discharged himself from any liability in case of accidental loss, by giving notice to the vendee that at a certain time he should weigh the bark. If the declaration had been framed upon the special contract, there must have been an allegation and proof of a sale at so much per ton, that the bark weighed so much, and the price amounted to a certain sum.(2)

7. Agreement for the sale of an ark-load of lumber. A part of the lumber was landed, but the landing of the rest was postponed for the purpose of having a measurement by the inspector. The vendor, having waited a day or two for the inspector, re-loaded the portion which had been landed, and went away with the entire load. In an action of *trover* brought by the vendee, held, the suit could not be sustained upon these facts. Something remained to be done between the vendor and vendee, and consequently the property had not passed. The lum-

(1) *Hanson v. Meyer*, 6 E. 614.

(2) *Simmons v. Swift*, 5 B. & C. 857.

* Littledale, J., thought the property might have passed, but still no action would lie for the price.

ber was to be assorted and measured, in order to ascertain the quantity. The loads contained different qualities, and at different prices. The contract was for a sale of *the whole*, and neither party was under any obligation to deliver less on the one hand or to receive less on the other. No evidence was offered, except the bringing of the present action, that the vendee was willing to accept and pay for that portion which had been unloaded, without having the rest. Nor was there any evidence that the vendor was willing to sell this portion alone. On the contrary, both parties intended to go on and complete the whole contract. Although the measuring and landing of a portion was part of the process of delivery; yet till measurement of the whole, the vendor had not completely surrendered his dominion. A part-delivery passes to the vendee a property in the portion delivered, only where there is an actual change of possession, control or dominion. In the present case, the vendor did not quit possession. Moreover, the vendee neither paid nor tendered the price, an act which he was bound to do without any demand by the vendor.(1)

8. A had sixty-nine bales of cotton, marked G, at the store of B, and thirty of the same mark, at the store of C, both in Brooklyn, N. Y. He sold sixty-six bales, marked G, to one D, giving him the following *pro forma* bill of parcels—"66 bales, say 19,800 lbs., \$12,00 per cwt., 1 per cent. off." D paid at the time \$1800, in part payment for the whole. The cotton lying at the store of C was afterwards destroyed by fire. D demanded of A an order for sixty-six bales, but A refused it and gave an order for only thirty-six, which were weighed by A, and another bill of parcels delivered to D, including the thirty-six according to the weigh-master's bill, and thirty bales at a certain weight each, accompanied with this clause, "deduct for supposed loss 150." Thirty-six bales were delivered at the weighing. A brings an action against D for the price of the thirty bales. Held, the suit could not be sustained, as these bales never became the property of D. They not being identified in the agreement, nor specifically sold, the contract might have

(1) Fitch v. Beach, 15 Wend. 221.

been fulfilled by delivering this number of bales, having the mark named, from any other place besides Brooklyn, or any other store in that city. So, if the agreement was construed as an engagement to sell the thirty bales at the warehouse of C, yet not being weighed, the property did not pass. The delivery of the thirty-six bales after the loss by fire was no recognition of D's claim to the rest. The only effect of such delivery and acceptance was to exonerate the vendor from his liability *pro tanto*, leaving the question open as to the rest of the property.(1)

9. The defendant agreed to purchase from the plaintiff a quantity of fish, at the rate of nineteen shillings per barrel; to pay for inspection; and, if the plaintiff would deliver the fish upon a certain dock on Long Island, that he (the plaintiff) should not be bound to make up the *wantage* upon inspection and re-packing, estimated at three per cent. On the other hand, if the delivery were on a dock in New York, the *wantage* was to be made up by the plaintiff. The parties agreed upon an inspector, and the plaintiff made his election to deliver the fish on Long Island. He put them upon the dock, but no one was ready to receive them, and they were not received. Held, under these circumstances, the plaintiff could not maintain assumpsit for goods sold and delivered. The parties intended, that the inspection should precede a complete delivery. Till such inspection took place, the quantity was uncertain. Moreover, the contract said nothing of the quality of the fish, and contained no warranty; till the inspection, therefore, it could not be known whether those furnished were such as the defendant was bound to receive. The act of unlading could not be considered a delivery. If the property were afterwards destroyed, the plaintiff could sustain no suit for the price, because the quality was left undetermined. It was further held, that if the contract had been in writing, an action in this form would not lie, but there must be a special declaration.(2)

10. The plaintiff sold to the defendant 289 bales of skins,

(1) Chapman v. Lathrop, 6 Cow. 110.

(2) Outwater v. Dodge, 7 Cow. 85.

stated to contain five dozen each, at so much per dozen. According to a usage of trade, it was the duty of the vendor to ascertain the number of skins by counting. Before this was done, the property was destroyed by fire. Held, the loss must fall on the plaintiff, and he could maintain no action for the value of the skins, either as for goods bargained and sold, or upon a count for not accepting bills of exchange according to agreement. The enumeration required was for the benefit of the vendor.(1)

11. A agreed with B to burn a kiln of bricks, for which he was to receive, when burnt, 10,000 bricks, not to be taken by himself, but delivered to him by B. Held, this was not a sale of a certain number of bricks, but a mere contract to sell them; and that, there having been no actual or constructive delivery to A, he had no attachable interest in the property. It would have been otherwise, it seems, if A had before such attachment demanded the stipulated number of bricks, and been directed by B to take them, or if B had in any way assented to his taking them.(2)

12. The defendant offered the plaintiff a certain sum for a steam-engine, payment to be made, partly when taken, which was to be in two or three weeks, and the balance by a note. The plaintiff accepted the offer, and said to the defendant, "you consider the engine to be yours, as it is" The defendant answered "yes." The boiler was set in bricks in the shop of the plaintiff, and could not be removed till the bricks were taken away, which the plaintiff was to do. The following week, he accordingly removed them. The defendant was proved to have said that he had purchased the engine, and to have inquired what would be the cost of getting it carried to a certain place. The contract was not in writing, nor was any part of the price paid or secured. The defendant did not take the engine. Held, there had been no legal delivery, and the contract was void by the Statute of Frauds. An act remained to be done by

(1) *Zagury v. Furnell*, 2 Camp. 240.

(2) *Brewer v. Smith*, 3 Greenl. 44.

the plaintiff, before the property was to be delivered, and therefore the title had not passed.(1)

13. A quantity of hay was purchased by bill of parcels and paid for, to be weighed out of the mow, at pleasure of the vendee. Held, before weighing, the vendee could not maintain *trover* for any part of the hay. The bill of parcels was merely a contract to deliver the stipulated quantity of hay.(2)

14. A assigns to B, as security, nine arches of bricks in a kiln containing a larger number, but these arches were not separated or specifically designated from the rest. A afterwards sold enough of the arches to leave less than nine, and the remaining number were attached by his creditors. Held, B could not maintain trespass against the officer.(3)

15. The same rule is applied, where an article manufactured by the vendor is delivered to the vendee, but on condition to be taken back if it proves unsatisfactory; more especially if any thing still remains to be done to it by the vendor.

16. The plaintiffs, machinists in Connecticut, agreed to furnish one A with a ponderous machine, weighing about eight tons, to be carted by them and put up in A's mill in Worcester. If it should work to A's satisfaction, he was to pay for it, otherwise it was to be taken away. The machine was accordingly placed in a new mill, which had been prepared to match it; but before being fully set up, or all the material parts furnished, it was put in operation for trial. A was not satisfied with the experiment. The same day, it was attached as his property. Held, the property had not passed to A, and the plaintiffs might maintain trespass against the officer. Under the circumstances, the plaintiffs could not have offered the article as complete according to contract; nor, had they refused to complete it, could A have maintained *trover* against them, but he must have sued upon his contract. And the plaintiffs were sufficiently *in possession* to maintain trespass. By the contract, they had the right of going to the building to complete the work, without being trespassers. It is as if a watchmaker should put up a

(1) Dole v. Stimpson, 21 Pick. 384.

(2) Davis v. Hill, 3 N. H. 382.

(3) Merrill v. Hunnewell, 13 Pick. 213.

clock, with an agreement that if it should keep good time, the owner of the house would buy it. In such case, the former might maintain trespass against any one interfering with the property before a trial.(1)

17. The rule, that where anything remains to be done to goods sold, by the vendor, the property does not pass, applies only where there is a mere *constructive* delivery and possession, not where there is an *actual* one. In this case, the materials and labor subsequently expended by him pass to the vendee *by accession*.(2)

18. Thus, where a quantity of goods, agreed to be sold at a certain rate, is delivered, the sale is complete, though they are still to be counted, weighed or measured, in order to determine the sum to be paid for them. The act of delivery shows that it is thereby intended to complete the sale. The measuring, &c. constitutes no part of the contract of sale. These principles were applied in a case, where the vendor was part-owner of a quantity of bricks estimated at 370,000, and sold his share in the whole.(3)

19. The rule above stated has been further qualified by a late decision in Massachusetts, as follows.

20. Where any act remains to be done to goods contracted to be sold—as, for instance, weighing or measuring,—and there is there no proof of the parties' intention that the property should pass; the title is not changed. But it is otherwise, where payment is not a condition precedent, and where the intention is that the sale should be complete.(4)

21. A, owning a quantity of timber lying in a pond at the end of a canal, in charge of the canal superintendent, agreed to sell it to B, B giving him the following instrument—"received of A four shots white oak plank, &c. for which I promise to pay him \$26 per thousand, board measure. The above timber delivered in the mill-pond," &c. A gave B a writing as follows "Received of B \$200 in part pay for timber." The remain-

(1) Phelps v. Willard, 16 Pick. 29.

(2) Sumner v. Hamlet, 12 Pick. 82. Everett v. Tindall, 5 Esp. 169.

(3) Macomber v. Parker, 13 Pick. 175.

(4) Riddle v. Varnum, 20 Pick. 280.

der to be paid in ninety days from surveying. Cancellation to be paid by B, when he takes the plank, &c. from the pond." A further agreed that B might have a measurement made by the superintendent, and that he would abide by it. Before any measurement, B became insolvent, and the property was attached by his creditors. A brings an action against the officer. Held, if there was a delivery, and if the parties intended to make the sale complete before ascertaining the measure; the property had passed to B, and the action could not be maintained.(1)

22. Where a quantity of bacon was sold for a fixed price, and the weighing of it was to take place merely for the satisfaction of the vendee; this act was held to be no ingredient in the contract, though important as an unequivocal act of possession and ownership as to the whole property; and the whole therefore passed to the vendee.(2)

23. The plaintiff purchased certain timber growing upon land of A, felled it, and sold it to B for so much per cubic foot; B to have liberty to convert the timber on the land. B marked and measured the trees, and the number of feet in each was ascertained, but the whole contents were not added. B having taken some of the trees, the plaintiff requested the servant of B not to remove any more timber, till he knew who was to pay for it. Held, the whole property passed to B, and the plaintiff had no lien for the price. The plaintiff parted with his right to go on A's land, which became, in reference to the timber, the warehouse of B. It might be doubted whether the plaintiff had *possession*, as he had no interest in the land. The circumstance of B's removing a part of the timber showed a *license* from the plaintiff. Nothing remained to be done by the latter to complete the sale.(3)

24. The following cases seem to contradict the first of the exceptions above stated.

25. Where goods, agreed to be sold, are delivered to the vendee, to be put in marketable condition, and paid for by weight, which is to be subsequently ascertained, this is a conditional de-

(1) Riddle v. Varnum, 20 Pick: 280

(2) Hammond v. Anderson, 1 N. R. 69. 2 H. Bl. 504, acc.

(3) Tansley v. Turner, 2 Scott, 238.

livery, and does not pass the property. Thus A contracted to sell B a pair of fat cattle, at so much per quarter, B to take them, prepare them for slaughtering and slaughter them, take the quarters to market, weigh them, and pay for the cattle the sum that the whole would amount to at \$7,50 per cwt. Immediately after coming into B's possession, the cattle were seized on execution by a previous creditor of B. Held, they were not liable to be thus taken. The vendor was not bound to deliver the property without payment, and this could not be made till the price should be ascertained by weighing. If B should have refused to slaughter the cattle, and put them to work instead, A might have retaken them. So also, if he had refused to pay after weighing; as the property did not pass till payment or a waiver thereof, and there could be no waiver till the price was known. It was wholly immaterial whether the remaining act was to be done by the vendor or vendee. The delivery was made for a special purpose and rather as if to a bailee than a purchaser. It was sufficient that the vendor had an interest in the act to be done, and a right to be present at the doing of it.(1)

26. A agreed with B, who kept a carpet store, upon certain false pretences, to buy a quantity of carpeting and pay cash therefor. According to usage, the carpeting was sent to his house in the roll, with the understanding that the required quantity should be cut off, and the remainder returned, with payment for the part retained. The carpets were made, and put down in A's house, and there remained three weeks before the rest was sent back. In the mean time A pawned the carpets to C, an auctioneer, who was employed to sell the furniture, and *bona fide* made advances upon the carpets. A then absconded. Held, B might reclaim the carpets from C. As the number of yards was to be determined before payment, no legal delivery had taken place. And even if the facts had shown such delivery, inasmuch as the statute of New York, providing for the punishment of the offence of obtaining goods by false pretences by imprisonment in the state prison, constitutes the act a felony;

(1) Ward v. Shaw, 7 Wend. 404.

B might, on this ground, regain his property, thus fraudulently obtained.(1)

SECTION IV.—DELIVERY TO ONE OF TWO PURCHASERS FROM
THE SAME VENDOR.

1. Where the same thing is sold to two persons by transfers otherwise equally valid, he who first acquires possession, becomes entitled to the property.* Thus, the plaintiff, residing at Boston, and being a creditor of one A, A at Philadelphia July 2, 1819, assigned to him by a written instrument, *for value received*, a quantity of teas. No money was paid, nor any discharge given. The instrument was sent by mail, and reached Boston, where the teas were, July 5. Two hours and a half after the making of the assignment, the defendant, an officer, attached the property, and took possession of it as belonging to A. The teas had been consigned to the attaching creditor, on the account, at the risk, and for the use of A; and the former had no notice of the assignment to the plaintiff. Held, the attaching creditor stood in the position of a purchaser for valuable consideration, and his title should prevail over the plaintiff's, because he first came into possession of the property. There was nothing in this case equivalent to a delivery to the plaintiff. Both he and A supposed that the goods were at sea, but A had no bill of lading or other document to deliver. If the property had been consigned to A, and he had received a bill of lading after his agreement with the plaintiff, and a third person had bought from A for valuable consideration without notice, and

(1) Andrews v. Dietrich, 14 Wend. 31.

* The same is [the doctrine of the civil law. "Manifesti juris est, eum, cui priori traditum est, in detinendo domino, esse potionem." Cod. 3, 32. 15.

"Ad vindicationem rei duobus separatim diverso tempore distractæ non is cui priori vendita, sed cui, pretio soluto, vel fide de eo habitâ, prius est tradita, admittendus est." Voet. ad Pand. lib. 6, tit. 1, s. 20.

received the bill of lading indorsed, such purchaser would have had a title against the plaintiff.(1)

2. A and B were general partners and part-owners with others of a brig. On February 21, the brig was at St. Croix, A being on board, and the consignee of the ship. A creditor of the firm at that place pressing for payment of his demand, one C, by request of A, purchased the ship from him, and paid the debt. The brig was delivered to C, who sent her to sea as his property, and caused her to be documented in his name. Eighteen days before the sale by A, B sold the brig at home to D. Held, C's title should prevail over D's, because he first obtained possession, and the effect of the transaction was the same, as if A had made a mortgage directly to the creditor, which would undoubtedly have had precedence of D's title.(2)

3. More especially will the title of the party who first obtains possession prevail, where the other transfer is to some extent executory; and where there are technical objections to its taking effect either as an absolute or conditional sale.

4. The joint owners of a ship agreed in writing to pledge it to one A as security for advances, and that he might buy any part of it at a certain rate, but made no delivery. One of the owners afterwards made a *bona fide* transfer of his share. Held, such transfer should prevail over the claim of A. The agreement with A did not pass an absolute title, because made expressly as security, and containing a provision for future purchase. Nor was it a mortgage, because there was no delivery, and the contract was executory, and the vessel was not in existence at the time. Nor was it a pledge, for want of delivery and continued possession. The contract more nearly resembled *bottomry*, but could not take effect in this form, because the thing did not exist at the time, and the facts would not justify such a construction.(3)

(1) *Lanfear v. Sumner*,* 17 Mass. 110. *Fletcher v. Howard*, 2 Aik. 115. *Ricker v. Cross*, 5 N. H. 572, 3.

(2) *Lamb v. Durant*, 12 Mass. 54.

(3) *Bonsey v. Amie*, 8 Pick. 236.

* It has been said (*Ricker v. Cross*, 5 N. H. 572, 3) that *Lanfear v. Sumner* is a case by itself, not reconcilable with *Putnam v. Dutch*, *Portland Bank v. Stacey*, and other cases relating to ships, &c.

SECTION V.—SALE OF SHIPS AT SEA, &c.

1. It has been already somewhat considered, (p. 31) how far the general rule of delivery is dispensed with, where property sold is of such a nature or so situated, that it cannot well be delivered at the time of sale. There is a certain species of property, however, to which this exception is applied more frequently and with greater propriety than any other, and therefore deserving of special notice; to wit, *ships* (and other property) *at sea*.

2. A transfer of a ship at sea is effectual by delivery of a bill of sale, subject to be set aside by creditors on the ground of fraud in case the mortgagee (or vendee) neglects to take possession upon her return, in reasonable time, or, as it is sometimes said, with all possible expedition. He however takes a title subject to any incumbrances incurred before notice of the sale; as, for instance, that of *hypothecation*. The question whether possession was taken in reasonable time, is for the jury. If the ship arrive at another port than that where the sale takes place, a notice forwarded by the vendee to the captain, is equivalent, it seems, to taking actual possession.(1)

3. Upon the same subject, the following remarks have been made by the Court in Massachusetts.

4. Personal property passes by grant upon execution of a deed, and at common law actual delivery is unnecessary. By the English Statute, 21 Jac. c. 19, a grant, without possession taken, does not protect the grantee as against the assignee of the grantor in case of bankruptcy. But the English bankrupt laws were never in force in Massachusetts. By the construction of the above act, the sale of a ship and cargo abroad is good, though no immediate possession be taken if the evidence of title is delivered, and possession taken, as soon as the property comes within reach of the vendee. In Massachusetts, neglect of delivery may be a fact from which fraud is inferred. There

(1) *Badlam v. Tucker*, 1 Pick, 396. *Joy v. Sears*, 9 Pick. 4. *Brinley v. Spring*, 7 Greenl. 241. 6 Conn. 284.

is no distinction between the effect of a *grand bill of sale* in England and the common bill of sale in use with us.(1)

5. The Court in Connecticut have also remarked, that ships at sea are commonly delivered by indorsement and delivery of the bill of sale and other documents, evidential of right and ownership. So, indorsement and delivery of a bill of lading are a sufficient delivery of a cargo afloat. But neither is good against creditors, unless actual possession be taken with all possible expedition.*(2)

6. Delivery is not necessary to the sale of a share in a ship. The case is similar to that of a ship at sea, in which delivery is impracticable.(3)

7. A and B being part owners of a ship, which lay at the port of Manchester, A at his house in Salem, a neighboring town, gives a mortgage to B of his share, by way of indemnity for B's liabilities on his account. One hour after this transfer was made, the ship was attached by creditors of A. Immediately upon her arrival at Salem, the port where she belonged, B went on board and attempted to take possession, but afterwards allowed the officer to retain possession for several days. Held, the sale was valid to pass the property without delivery, which was impossible as the vessel was situated at that time, that the possession of the attaching officer was wrongful in its inception, and there was no *laches* on the part of B sufficient to make it lawful, the law requiring strong circumstances to mature a wrong by sufferance into a right. Whether, if A had continued to have possession jointly with B, the sale would be void, *qu*.(4)

8. A ship at sea, bound to a port in Massachusetts, was mortgaged in another state, the mortgagor to have possession till default in paying certain notes. After her arrival in port, the ship was attached in a suit against the mortgagor and another part-owner. Subsequently to the attachment, and in reasonable time

(1) Portland Bank v. Stacey, 4 Mass. 663.

(2) Ingraham v. Wheeler, 6 Conn. 284. Wendover v. Høgeboom, 7 John. 308.

(3) Addis v. Baker, 1 Anst. 222.

(4) Putnam v. Dutch, 8 Mass. 287.

*A ship passes by delivery only without any bill of sale. The law of the United States, requiring a *register* to be inserted in the bill of sale, affects the vessel only as an American ship, with certain privileges resulting from its national character.

after the mortgagee's right to take possession accrued, his agent at the port of arrival gave notice of his claim at the custom-house, by a memorandum on the certificate of enrolment, the ship being then in possession of the attaching officer. Held, the mortgagee had a good title; that a mortgagee is not bound to follow the vessel from port to port, but may lawfully await her return to the port where she belongs, and where the transfer was made; and that notice at the custom-house was equivalent to a demand, as an actual demand would be useless, because the ship was then in the officer's hands. The clause in the instrument, authorizing the mortgagor to keep possession, was not fraudulent, being consistent with the expressed trust, and giving him no false credit.(1)

9. On the 11th of August, one eighth of a vessel at sea, belonging to the port of Hyannis, was sold to a purchaser at Nantucket. On the 22d she arrived at H, but without the vendee's knowledge, and on the 29th sailed on a new voyage. September 16th, she returned to H, and was attached the next day by creditors of the vendor. The vendee came from Nantucket by the first packet after hearing of the arrival of the vessel, reached H September 23d, and replevied her in the present suit. Held, judgment should be rendered for the plaintiff. The law did not require him to have an agent at H to take possession; and as the sale was only of a share in the vessel, possession was comparatively unimportant, as negating fraud.(2)

10. The plaintiff agreed to take a conveyance of a ship from one A, if he should conclude to execute such conveyance, and that the bill of sale should be left with B for the plaintiff's use. On the 16th day of the month, a bill of sale was accordingly made, and delivered to B, and on the 19th the bill of sale and the ship were taken possession of by the plaintiff, as soon as practicable after the arrival of the latter at his place of residence. On the 18th, the ship was attached by creditors of A. Held, the plaintiff had a title which should prevail over the attachment.(3)

(1) *Badlam v. Tucker*, 1 Pick. 389.

(2) *Joy v. Sears*, 9 Pick. 4.

(3) *Buffington v. Curtis*, 15 Mass. 528.

11. Where a ship at sea is sold by the owner at home, and also by the master under an authority carried out by him; the purchaser on shore is entitled to the proceeds in the master's hands. So in case of similar sales of goods, the master becomes an agent of the vendee, upon receiving notice of the sale.(1)

12. It has been contended that this rule (as to the sale of ships at sea) applies to ships only, being, with regard to them, a rule of *necessity*, inasmuch as they are usually at sea. But it is now settled, that the same principle applies to a cargo as to a vessel, and to all cases of sale, whether the property be on land or water, where delivery is at the time of sale impracticable.(2)

SECTION VI.—DELIVERY OBTAINED BY FRAUD.

1. A fraudulent vendee gains no property against the vendor. But, as possession is *prima facie* evidence of property, if the vendor has delivered possession, with the intent that the property shall pass as well as the possession; a *bona fide* purchaser from the first vendee shall hold the goods. The principle is, that the vendor has reposed confidence in the first vendee, and thus enabled him to commit a fraud; and therefore the equity of the second purchaser is the best.(3)

2. After delivery of goods sold, although there was fraud on the part of the vendee, the vendor cannot forbid their being taken away, or maintain trespass against the party taking them.(4)

SECTION VII.—TIME AND PLACE OF DELIVERY.

1. Where a purchaser of goods agrees to pay for them upon delivery at a certain time and place; in order to maintain an ac-

(1) Gardner v. Howland, 2 Pick. 601, 2.

(2) Gardner v. Howland, 2 Pick. 602. 2 T. R. 485. Ricker v. Cross, 5 N. H. 571, 2.

(3) Per Savage, Ch. J., Andrews v. Dieterich, 14 Wend. 34.

(4) McCarty v. Vickery, 12 John. 348.

tion for the price, the whole must be delivered or tendered accordingly. Part-delivery and acceptance, of some before and some after the time, are insufficient.(1)

2. But where one agrees to deliver property at a certain time and place, and delivers it at another time and place without objection from the vendee; the latter is held to have waived all objection on this ground.(2)

3. Where a written contract for the sale of goods specifies no time for delivery, in an action for not delivering them, the seller cannot show a parol agreement that they should be taken away immediately, or a usage that where the delivery is to be future, the contract must so specify.(3)

4. Where no time is fixed for delivery of goods sold, the law allows a reasonable time. If, upon demand by the vendee, no objection is made as to time, and no question asked, by the vendor, his refusal to deliver is a breach of contract.(4)

5. A purchased three quarters of a vessel; two quarters for himself, and the other quarter for B by virtue of a prior agreement with him, and took a bill of sale of the whole to himself, agreeing to convey to B his share. B demanded a bill of sale, but A refused to give one. A made out but did not tender a bill of sale, but his executrix, the plaintiff, after his death, and more than two years after the purchase, tendered it. Held, an action did not lie against B for the price.(5)

6. The defendant, having contracted with one A to build for him certain machinery, and deliver it at a stipulated time, accordingly contracted with the plaintiff to build the machinery and deliver it to A, and to pay him therefor a certain price. The property was delivered by the plaintiff to A after the time agreed on, the delay having taken place at the request of A. Held, the defendant was liable for the price, if he assented to

(1) *Davenport v. Wheeler*, 7 Cow. 231.

(2) *Baldwin v. Farnsworth*, 1 Fairf. 414.

(3) *Greaves v. Ashlin*, 3 Camp. 426.

(4) *Blydenburgh v. Welsh*, Bal. 331.

(5) *Higgins v. Chessman*, 9 Pick. 7.

this delay, or, knowing of A's request, did not expressly dissent.(1)*

7. A, having contracted with B to deliver him pheasants on the 12th of October, sent them to the coach-office on that day, but they did not reach B till afterwards. Held, a compliance with the contract.(2)

8. An agreement for the sale of flax provided that it should be sent from St. Petersburg, not later than the thirty-first day of July, either for Hull or London. Before this day arrived, the flax was sent from Petersburg in lighters, and put on board a ship at Cronstadt; but the ship did not sail till after the day. Held, a sufficient compliance with the contract.(3)

9. Agreement to sell certain produce, and deliver it at the house of the vendee within *a few days*. In an action brought by the vendee for non-delivery, held, he must prove a demand upon the vendor, before commencement of suit, or at least, that he was ready and willing to pay for the property at the place agreed.(4)

10. A sold to B a quantity of fish, to be delivered at one of two places, at the option of the vendor. The fish were left at one of the places named, but no notice given to B, and consequently they remained there till they were spoiled. Held, the loss must fall upon the vendor, who was bound to have notified the vendee of the place of delivery.(5)

11. Sale of a quantity of barley, with an agreement to de-

(1) Flagg v. Dryden, 7 Pick. 52.

(2) Honeywood v. Stone, 1 Chit. 142.

(3) Busk v. Spence, 4 Camp. 329.

(4) Stone v. Case, 13 Wend. 283.

(5) Rogers v. Van Hoesen, 12 John. 221.

* The plaintiff gave a bill of parcels of the machinery to a creditor, as security, but without delivery. Held, no title passed to the creditor, and therefore the transaction was no bar to the present action. Nor was it any defence to the action, that after delivery to A, the machinery was taken upon execution against the plaintiff; for A might bring trespass against the officer, the officer call upon the creditors for indemnity, and they, in turn, sue out writs of *scire facias* upon their judgments against the plaintiff. It was further held, that a mortgage made by A before delivery of the whole machinery, was no evidence of acceptance, being only a declaration of his, but not proof of a fact. Flagg v. Dryden, 7 Pick. 52.

liver it alongside a sloop or warehouse at G or K at the option of the vendee, in all April or sooner. April 29, the barley was brought into the dock at G. Four days after this were necessary to unload and deliver it to the vendee. Held, the contract was broken.(1)

12. The plaintiff agreed with the defendant to purchase from him a ship then in course of building in Maine, to be "completed and delivered as soon as possible at F village or B, either of these places, at the option of the purchaser." Held, this contract bound the defendant to notify the plaintiff when the vessel was completed, that he might make his election as to the place of delivery; and that having, without such notice, sold the vessel to a third person, the defendant was liable to an action for damages. The law required him to give notice, because he had the best means of knowledge on the subject. Nor was the plaintiff bound to employ an agent to observe the progress of the vessel. It was further held, the agreement having been made in December 1832, the vessel launched in April or the first of May 1833, and the suit commenced in July, that the plaintiff had not waived any right by delay. He was not bound to make an election at the time of the contract, but when the ship was finished.(2)

13. A agrees to sell B 50 hogsheads of sugar, double loaves, at 100 shillings per cwt., to be delivered, free from charge, on board a certain ship. B sells to C by the same description, A assenting to the sale. The sugar was not delivered or reweighed. Held, C could not maintain trover against A.

14. A contract for the sale of sugar provided that it should be "free on board a foreign ship." Held, the vendor was not thereby bound to deliver it into the hands of the vendee, or to transfer it to his name in the books of the warehouse where it lay; but only to put it on board a foreign ship, to be named by the vendee.(3)

15. Where a contract provides that goods sold shall be upon

(1) *Cox v. Todd*, 7 D. & R. 131.

(2) *Spooner v. Baxter*, 16 Pick. 409.

(3) *Wackerbarth v. Masson*, 3 Camp. 270.

interest after a certain time from *shipment*, this is conclusive evidence that they are to be sent by *water*.(1)

16. A, at one port, ordered goods from B, at another, to be sent by a common sea-carrier. The goods exceeded in value 5*l.*, and the carrier's liability was notoriously limited to this amount. B deposited the goods at the receiving house of the carrier, with directions to forward them to their place of destination; but they were not specifically entered and paid for accordingly. Held, B had implied authority and it was his duty thus to enter them, and to pay any extra charge requisite for securing the carrier's responsibility; and, not having done so, and the goods being lost, he could not recover the price of A.(2)

17. A contract was made in London to sell a quantity of tallow, then at sea; but unless it should *arrive* in a certain time, the contract to be void. Held, this meant, unless it should arrive at *London*.(3)

18. Contract for the sale of goods *on arrival per Fanny, &c.* Held, this meant the arrival of the goods expected by this vessel; and that if the vessel arrived without the goods, and through no fault of the vendor, the latter was not liable on the contract. The parties did not intend to enter into *a wager*. And the expression in the agreement, *sale*, meant merely *a contract for a sale*.(4)

19. An agreement for the sale of goods provided, that as soon as the vendor knew the name of the ship by which they were to be forwarded, he should inform the vendee of it. The vendor, residing in London, was informed of the name on the twelfth, but did not communicate it to the vendee, residing at Hull till the twentieth, of the month. Held, the condition of the contract was broken, and the vendee not bound by it, though he had suffered no damage from want of the above information.(5)

(1) *Whiting v. Farrand*, 1 Conn. 60.

(2) *Clarke v. Hutchins*, 14 E. 475.

(3) *Idle v. Thornton*, 3 Camp. 274.

(4) *Boyd v. Siffkin*, 2 Camp. 326, 327 n.

(5) *Busk v. Spence*, 4 Camp. 329.

20. A agreed to sell B fifty tons of St. Petersburg sound, clear hemp, at £59 per ton, to be shipped from St. Petersburg in June or July following, and information to be given of the name of the vessel, as soon as known. If the vessel did not arrive by December 31, the contract to be void. September 5, A gave notice that fifty tons had been shipped in the *Lively*. On the 20th of the same month, A claimed the right (which however was denied by B) of making up the deficiency, if any, from another ship. September 20, the *Lively* arrived, bringing forty-four tons, twenty tons of which were delivered to B, the rest being shipped at St. Petersburg to other persons. October 4, the remaining thirty tons arrived in another ship. Held, the only material parts of this contract, were the quantity, quality, price, time and place of shipment and delivery, but it did not require that the hemp should be sent in one ship; that as the notice of Sept. 5 was founded on a mistake, A might supply the deficiency in the quantity first sent, by another vessel; and that he was bound to deliver B from the *Lively* only so much as was ascribed to the latter.(1)

SECTION VIII.—ACCEPTANCE.

1. Formerly, a *delivery* of goods by the seller was sufficient to take the contract out of the statute of frauds. But it is now clearly settled, that in order to satisfy the statute, there must be a delivery of the goods by the vendor, with an intention of vesting the right of possession in the vendee; and there must be an actual *receiving* and *acceptance* by the latter, with an intention of taking the possession as owner. The word *accepted*, in the act, imports that each party do something to bind the bargain. It lies upon the plaintiff to make out that there was such delivery and acceptance. And it must be an *ultimate* acceptance, such as completely affirms the contract. It is necessary that

(1) *Thornton v. Simpson*, 2 Marsh, 267. 6 Taun. 556.

the vendee should no longer have it in his power to object to the *quantum* or quality of the goods.(1)*

2. But, it seems, if the buyer take away the goods without the seller's assent, the buyer himself would be bound by the bargain.(2)

3. Where one agrees for the purchase of goods abroad, and they are put on board a ship chartered by him, but he refuses to accept them; this does not constitute a delivery and acceptance.(3)

4. There can be no acceptance or actual receipt by a purchaser, unless there is a change of possession; and unless the seller divests himself of the possession, though but for a moment, the property remains in him.(4)

5. It is said, where a vendor of goods has ascertained and appropriated them, and the vendee has assented to such appropriation; the property passes to the latter. There is no case contradictory to this principle.(5)

6. In *Elmore v. Stone*(6), the buyer directed expense to be incurred; which was held to be evidence of acceptance.

7. In *Chaplin v. Rogers*,(7) the purchaser of hay dealt with it as his own; which the jury thought was sufficient evidence of acceptance.

8. Where a vendor declares against the vendee for *non acceptance* of the goods sold, it seems the question of acceptance does not arise.(8)

9. A agreed with B to make certain *pew pannels* for the lat-

(1) *Baldey v. Parker*, 2 B. & C. 44. *Phillips v. Bistolli*, 2 Ib. 513. *Tempest v. Fitzgerald*, 3 B. & A. 680. Per Heath, J., *Kent v. Huskinson*, 3 B. & P. 235. *Hanson v. Armitage*, 5 B. & A. 559. *Acebal v. Levy*, 10 Bing. 384.

(2) *Tempest v. Fitzgerald*, 3 B. & A. 680.

(3) *Acebal v. Levy*, 10 Bing. 376.

(4) *Carter v. Toussaint*, 5 B. & A. 859.

(5) *Alexander v. Gardner*, 1 Scott, 640.

(6) 1 Taun. 458.

(7) 1 E. 192.

(8) *Acebal v. Levy*, 10 Bing. 384.

* The naked possession of goods for a short time, and acts of ownership in relation to them, such as loaning and offering to sell, do not authorize a verdict of a transfer, unless accompanied by some acquiescence or recognition on the part of the owner. *Tompkins v. Haile*, 3 Wend. 406.

ter, to be paid for on delivery. The pannels were brought to the meeting-house, while B was absent from town. The building committee made objections to them, but they were left at the [meeting-house, and piled separately from other lumber. Held, there was no legal delivery.(1)

10. By the conditions of an auction sale, the purchaser was to pay 30 per cent. upon the price, on being declared the highest bidder, and the residue before the goods were removed. A lot was knocked down to A and immediately delivered. He kept it three or four minutes, then stated that he had mistaken the price, and refused to retain it. No part of the price was paid. Held, it was a question for the jury, whether the seller had delivered and the buyer actually accepted the goods, with the mutual intention of transferring the right of possession.(2)*

11. Goods of the value of £144 were made to order, and remained in the possession of the vendor, at the request of the vendee, with the exception of a small part, which the vendee took away. Held, there was no sufficient acceptance of the residue of the goods.(3)

12. A purchased of B, a trader, several articles, at distinct prices, each under £10, but the whole amounting to £70. A marked with a pencil some of the articles, saw others measured, and helped to cut off others. He then requested that an account of the goods might be sent to him, which was done, together with the goods, but he refused to accept them. Held, the contract was an entire one and within the Statute of Frauds, and that there was no delivery and acceptance to take the case out of the statute, and sustain an action for goods sold. It was remarked by Bayley, J., upon the question what interval of time must elapse between the purchase of different articles in order to make the contract separate, that if the pur-

(1) Woodbury v. Long, 8 Pick. 543.

(2) Phillips v. Bistolli, 2 Barn. & Cr. 511.

(3) Thompson v. Maceroni, 3 B. & C. 1.

* It was said by the Court, that the evidence of delivery and acceptance was very slight. The deposit not having been paid, the seller probably had not intended to part with all control over the goods. And the short interval for which the seller kept possession was the only fact showing an actual acceptance.

chaser went away after purchasing one, and returned soon enough to warrant the supposition that the whole was intended to be one transaction, it would be held one entire contract. Holroyd, J. remarked that the statute applies, where the contract, *either at the commencement or conclusion*, amounts to £10.(1)

13. A bargained and sold to B in A's farm-yard a stack of hay there standing, and B afterwards sold part of it to C, who took it away without the knowledge and against the direction of B. Held, these facts authorized the jury to presume a delivery to B and an acceptance by him, which took the case out of the Statute of Frauds, and sustained an action by A for goods sold and delivered.(2)

14. The plaintiff sold a horse to the defendant. No time was fixed for payment. The horse was *fixed* in the presence and with the approbation of the defendant, but was to remain with the plaintiff twenty days, and be no charge to the defendant. At the expiration of this time, he was sent to grass by order of the defendant, but entered as belonging to the plaintiff. Held, there was no *acceptance*, and an action for the price did not lie.(3)

15. A, residing in the country, ordered from B in the city certain plough-castings, to be forwarded by canal. A portion of them only were sent, and those by land conveyance, at a greater expense than would have been incurred in the mode agreed on. Held, B could not recover the price of those sent, without proving an acceptance by A, and that this was a question for the jury. Clear evidence that the goods came to the hands of A, would be sufficient proof of acceptance, unless rebutted by showing a refusal and notice thereof. On the contrary, it was proved, that the property never came to A's possession. So if a bill of the goods had been sent and received, this would sustain the action, unless A had given express notice of non-acceptance.(4)

16. A, a purchaser, verbally agreed at a public market with

(1) Baldey v. Parker, 2 Barn. & C. 37.

(2) Chaplin v Rogers, 1 E. 192.

(3) Carter v. Toussaint, 5 B. & A. 855.

(4) Corning v. Colt, 5 Wend. 253.

the agent of B, the seller, to purchase twelve bushels of tares, then in B's possession, being part of a larger quantity in bulk, to remain in B's possession till called for. A sample was offered to A, but he declined accepting it, having seen the tares upon B's land. The agent, upon returning home, measured the twelve bushels, and set them apart for A, to be delivered to him on demand. Held, if A had once accepted, he could not object, though the goods should not conform to the sample; but he might make any objection at the time when they were tendered to him for acceptance; and that in this case there had been no acceptance, and the action did not lie. It was further held, that the measuring of the goods did not constitute an acceptance, whether done by the seller as part of the contract or by his agent, in compliance with a request from A; for this would authorize the agent only to measure the goods, not to accept them.(1)

17. A ordered from B a ruling-machine, to be manufactured by B, without any agreement as to the price. Upon completion of the machine, A paid money on account, admitted it was made to order, and requested B to send it home to him, but refused to pay the price demanded. B refused to deliver the machine without payment in full of this price, and gave orders for the commencement of a suit to recover it. A agreed to make a settlement, if time were allowed him. Held, these facts showed an acceptance of the machine, and sustained a suit for goods bargained and sold.(2)

18. A agreed to buy a horse from B for cash, and take him away within a certain time. About the end of this period, A rode the horse, and gave directions as to his treatment, but requested B to keep him longer, saying that he would at the end of this time take and pay for the horse. B assented to this proposition. Before the horse was taken or paid for, he died. Held, there was no acceptance, and no action would lie for the price. The delivery and payment in this case were to be concurrent acts. Hence the bargain was at first a mere contract,

(1) *Howe v. Palmer*, 3 B. & A. 321.

(2) *Elliott v. Pybus*, 10 Bing. 512.

and if A had rode away the horse without payment, B might have had *trover* against him.(1)

19. The agent of A, a drysalter in London, called on B, a carpet-manufacturer at Kidderminster, for orders in his business. B ordered a quantity of cream of tartar, and offered to take a quantity of lac-dye at a certain price. The agent said that this was too low, but he would write to A on the subject, and if B did not hear from him in one or two days, his (B's) offer should be considered as accepted. A did not write to B, but sent both the cream of tartar and the lac-dye. Held, the contract for the lac-dye was not complete, till the expiration of the time allowed to A for deliberating upon B's proposition; hence the order for the two articles could not be considered as a joint one, and acceptance of part was not an acceptance of the whole.(2)

20. To an action for the price of a fire-engine sold by the plaintiff to the defendant, the latter pleaded the Statute of Frauds. The plaintiff replied, an acceptance of the engine. The evidence was, that after the sale the defendant took a third person to look at the engine, and mentioned who would be likely to purchase it; that he said to another person, "I know what I am going to do with it;" and to another, "I have a concern in the engine." Held, it was a question for the jury, whether the defendant had treated and dealt with the article as his; and if so, judgment must be for the plaintiff.(3)

21. Action by A against B for the price of a quantity of cider. B verbally contracted for the cider at his (B's) house. It was of good quality, and was sent by wagon to B's house, but he refused to take it in, and deposited it in the neighboring warehouse of a third person. B never notified A of his refusal to receive the cider, nor did he send it back. Held, the action did not lie, for want of an unequivocal acceptance or a contract in writing.(4)

22. A, residing in Yorkshire, ordered two chests of tea from

(1) *Tempest v. Fitzgerald*, 3 B. & A. 680.

(2) *Price v. Lea*, 1 B. & C. 156.

(3) *Baines v. Jevons*, 7 C. & P. 268.

(4) *Nicholle v. Plume*, 1 Carr. & P. 272.

B in London. The teas were forwarded to a certain wharf, to be sent by sea. Goods, previously sold by B to A, had been received for A at this wharf. The vessel carrying the teas was lost, and no invoice was sent, till after the loss had been heard of. It was not proved, whether the bargain was parol or written. Held, A was not bound by a mere constructive acceptance.(1)

23. A verbally agreed to sell B twenty hogsheads of sugar, from a larger quantity which he had in bulk. Four hogsheads were filled, delivered and accepted. A then filled sixteen more, and requested B to take them away, which he promised to do. Held, the acceptance of the four hogsheads was an acceptance of a part of the whole twenty; that the property in the remaining sixteen passed, subject to a lien for the price, so that any loss would fall upon the vendee; and that A might recover in an action for goods bargained and sold.(2)

24. A verbally ordered from B a bale of sponge, at 11s. per lb. The sponge was sent, but A returned it, writing that he had examined the article, that it was worth only 6s., and he had therefore sent it back. Held, this letter was no *acceptance* of the sponge, unless *refusal to accept* could be so construed; that it was merely an affirmance of *some* order for *some* sponge, and the article was returned as soon as received and examined, as not being the kind wanted; and, so far as appeared from the letter, it might have been sent only on speculation.(3)

25. A contracted with B to deliver him certain manufactured articles of a particular description, at a particular time and place. Articles corresponding to the specified quantity and description, but not to the quality agreed for, were delivered at the time and place named. The vendee used a part of the goods, and paid a part of the price without objection, till a question was raised concerning payment. Held, the facts amounted to an acceptance, and a waiver of any claim for damages or a reduction of the price, on account of open and apparent defects.(4)

(1) *Hanson v. Armitage*, 1 Carr. & P. 273 n. 5 B. & A. 557.

(2) *Rohde v. Thwaites*, 6 B. & C. 388.

(3) *Kent v. Huskinson*, 3 B. & P. 233.

(4) *Wilkins v. Stevens*, 8 Verm 214.

26. A built a wagon for B. B employed a smith to affix the iron-work, who assisted A's men in doing it, and charged B for his services. B also employed a *tilt-maker* to tilt the wagon. The wagon remained in possession of A during these operations, and was left with A to be finished after they were completed. Held, these facts did not show any *acceptance* of the wagon. By St. 9 Geo. 4, ch. 14, the 17th section of the Statute of Frauds, requiring acceptance in default of a written agreement, is extended to *executory* contracts, or those relating to goods not yet in existence. In this case, B procured the work to be done upon the wagon, while it was in progress, and incapable of delivery. Had A's work upon it been done, and the workmen employed by B merely finished the wagon, the case might have been different. But, under the circumstances, A retained a lien upon it, and there was no evidence of any intention to deliver or accept. Held, A could not sustain an action for the price.(1)

27. A agreed to purchase of B one hundred sacks of good English seconds flour, at 45s. per sack. Twenty-two sacks were delivered, and A then gave notice that the flour was unsaleable and bad, and that the vendor should take it away immediately; but did not return it. Whether there was an *acceptance*, qu.(2)

28. A, a horse-dealer, contracted with the servant of B at a fair, to purchase a horse for £45, to be delivered to A in about one hour. This time having elapsed, the servant called on A at his stables, to know whether he was ready to receive the horse. A said he should have a vacant stall in about an hour, and would then take the horse, but, before the expiration of that time, refused to do it. On the next day, the horse was returned to B. B sent him back to A, who refused to receive him. No money was paid at the sale of the horse, but A offered a shilling to the servant, which was not accepted. A told C that he had bought the horse, that he would suit him, and that he (A) would take £5 for buying him. After the sale, and during the time fixed for delivery at the stables, A took the horse from

(1) *Maberly v. Sheppard*, 3 Moo. & Scott, 436.

(2) *Jackson v. Lowe*, 7 Moo. 219.

the stables, when C discovered a defect in him, and refused to purchase. Held, it was a question for the jury, whether these facts constituted a delivery to, and acceptance by A, so as to take the case out of the Statute of Frauds; whether any thing remained to be done by the seller, or whether what he had done through his servant, constituted a delivery.(1)

(1) *Blenkinsop v. Clayton*, 1 Moo. 328.

CHAPTER IV.

THE PRICE OF GOODS SOLD, AND PAYMENT THEREOF.

1. *Price necessary to a sale—how it may be fixed—reasonable price.*
6. *Payment—by negotiable securities, which are dishonored; whether the vendor may sue for the price, or reclaim the goods, &c.*
19. *Payment by other securities.*
21. *Sale from debtor to creditor.*
23. *Agreement to pay by bill, &c.—how construed.*

1. A *price* is one of the essential elements of the contract of sale. And the price must be certain or capable of being made certain. If left to be fixed by the vendor or vendee, the sale is void. But it may be left to be settled by arbitration.(1)*

2. It is to be understood, however, that where an agreement for the sale of goods mentions no price, and the vendee accepts them, the law implies a reasonable price and sustains the bar-

(1) Aycliffe's Civ. Law, p. 4, tit. 4. 4 Pick. 189. Shep. Touch. 224.

* "Pretium autem constitui oportet, nam nulla emptio sine pretio esse potest." But "id certum est, quod certum reddi potest." "Quoties sic composita sit venditio, quanti ille æstimaverit, sub hac conditione stare contractus, et stet siquidem ille, qui nominatus est, pretium definierit, tunc omnimodo secundum ejus æstimationem et pretium persolvatur, et res tradatur, et venditio ad effectum perducatur.—Just. 3, 24. 1.

gain; for otherwise the vendee might keep the goods without payment. Whether the same principle applies, where the contract is still executory, and the goods remain in the possession or under the control of the vendor, *qu.*(1)

3. A memorandum for the sale of goods is legally valid notwithstanding the Statute of Frauds, though no price be named, if none were agreed upon. But if a written contract of sale mentions no price, and it is proved by parol evidence that a price was agreed on, the writing cannot be used as evidence of the agreement between the parties. The law requires a note in writing of *the bargain*, that is, of *the whole bargain*.(2)

4. So, where it is proved by parol evidence, that there was an agreement for a sale of goods at a specified price, the vendor cannot recover upon a *quantum valebant* count, by offering in evidence a writing which contains no provision as to the price.(3)

5. A count, alleging a sale "at the then shipping price at G in Spain," is not sustained by a written agreement, which is silent as to the price. From such a writing the law would infer a *reasonable* price, by which is meant such an one as the jury would judge to be fair, but which may greatly differ from the *current* price.(4)

6. With regard to the *payment* for goods purchased, a very common method is by giving bills of exchange or other negotiable securities for the price. Upon the effect of such payment, many cases are to be found in the books.

7. The purchaser of goods gave bills of exchange in payment, which the vendor negotiated, but they afterwards came back into his hands. In an action brought by the vendor for the price, it appeared that the bills protested were in possession of his agent. Held, the plaintiff might recover without delivering up the bills. The defendant might have relief in Equity,

(1) *Acebal v. Levy*, 4 M. & Scott, 217. 10 Bing. 382. See *Webber v. Tivill*, 2 Saun. 121, n. 2.

(2) *Hoadly v. Maclaine*, 4 Moo. & Scott, 340. *Elmore v. Kingscote*, 5 B. & C. 583.

(3) *Cooper v. Smith*, 15 E. 103.

(4) *Acebal v. Levy*, 10 Bing. 382, 3.

amount of the verdict into court, and move a stay of execution, till the bills should be delivered up.(1)

8. Goods were sold, to be paid for by a bill drawn upon the agent of the vendee. At the maturity of the bill, the agent having no funds, it was renewed without notice to the vendee. Held, this was no discharge of the latter, but he was still liable for the price of the goods. The agent stood in nature of a surety, and it was for the benefit of the vendee himself to have the bill renewed.(2)

9. The vendee of goods accepted a bill of exchange for the price, which was negotiated by the vendor. The indorsee of the bill recovered judgment against the purchaser, but did not take out execution. The vendor himself took up the bill, and received a mortgage from the vendee as security, but derived no money therefrom. Held, these facts did not constitute a *payment* to the vendor, showing merely a judgment, without satisfaction.(3)

10. Goods sold were paid for by a bill of exchange at one month from sight, given by the banker of the vendee for an amount exceeding the price of the goods, the vendor paying the difference in cash. The bill being dishonored, held, the vendor might recover the agreed price.(4)

11. A broker sold to the defendant three hundred barrels of flour, on account of the plaintiff, at \$8 per barrel, which was a fair price. The flour had not arrived at the time of sale, but was daily expected. The plaintiff, having been absent, upon his return, offered to deliver the flour, but the defendant declined receiving it. He however said afterwards that he would take and pay for it, and gave orders that it be sent to his store. The flour was placed on the dock and ready for delivery. The defendant directed the plaintiff to send it to his store, saying, that he would draw his check in payment; but the plaintiff refused to have the flour removed without payment in cash. Accordingly, it was neither delivered nor paid for, and was re-sold by another broker for \$6,50 per barrel, the price having fallen

(1) *Hadwen v. Mendisabal*, 2 C. & P. 20. 10 Moore, 477.

(2) *Clarke v. Noel*, 3 Camp. 411.

(3) *Tarleton v. Allhusen*, 2 Ad. & El. 32.

(4) *Fry v. Hill*, 7 Taun. 397.

since the former contract. In an action for refusing to receive the flour and to recover the difference between the two prices; held, under the circumstances, the delivery and payment were to be simultaneous acts; that the check of the vendee could no more be considered as payment than his note, inasmuch as he might have no funds, or the bank might have good reason for dishonoring the draft; and therefore that the action might be sustained.(1)

12. The traveler of A, residing in London, called upon B, a debtor of A, in the country, for payment; and, being unable to obtain money from him, consented, upon the request of B, to take his acceptance for the amount. The traveler accordingly wrote an entire bill, except the name of A, the drawer, and forwarded it, accepted, to A, telling B at the same time that he thought it would not be satisfactory to A. A retained the bill, but did not sign it as drawer. The traveler had no authority to sign bills for A, but was in the habit of transmitting them in this way, to avoid the risk of loss. Before maturity of the bill, A brings an action upon the original debt, to which B pleaded specially the drawing and acceptance of a bill. Held, the above facts did not amount to the drawing of a bill, or sustain the defendant's plea. The traveler, having no authority to sign, consequently had none to make, the bill; and unless adopted by A, it could not be regarded as drawn by him.(2)

13. To an action for goods sold and delivered the defendant pleaded, that as to £9, part of the debt, he, the defendant, accepted a stamped bill for £20; that there was no drawer to the bill; that he accepted it in part for the debt in question, and in part for the accommodation of the plaintiff; that he delivered it to the plaintiff, who received it in payment of the debt; and that the bill was not due at the commencement of this suit. The plaintiff replied, that the bill still remained in his hands, not having been negotiated or paid, and without any drawer. Held, the plea was good, and the replication no answer to it. Whether the plea would be good on demurrer, qu.(3)

(1) *Clarkson v. Carter*, 3 Cow. 84

(2) *Vyse v. Clarke*, 5 C. & P. 403

(3) *Simon v. Lloyd*, 3 Dowl. P. C. 813.

14. Where the vendee of goods agrees to pay for them on delivery, and gives a check, which he has no reason to expect will be paid, and which is accordingly dishonored; this is a fraud, and no property passes.(1)

15. By agreement, the vendee of goods was to pay for them in cash, but he obtained possession from the servant of the vendor by means of a check, which he represented as equivalent to money, but which was dishonored, he having overdrawn many months. On the day of sale, the vendee gave to a prior creditor a warrant of attorney for a judgment against himself, upon which the goods were seized in execution. Held, it seems, that the vendor might regain his goods even by stratagem, no property having passed; but that it was a question for the jury, as determining this right, whether the vendee at the time of sale intended not to pay for them.(2)

16. Where a person has given a bill or check for a deposit at an auction sale, he may set up in defence to a suit thereupon the same facts upon which he might recover it back, if paid in cash.(3)

17. But where a vendor receives a check in payment and procures the money upon it, he is estopped to deny that the check was given in full satisfaction, and to make any further claim for the price.

18. A was indebted to B for goods, the price of which was not liquidated by agreement. A paid a part of the debt, and finally stated an account, drew a check for the balance, and sent it to B, who objected to the messenger that the balance was too small, but received the check and procured the money. In a suit brought by B several months afterwards, held, he was estopped as to the amount of the goods, and could not maintain the action. The above proceeding was equivalent to an *insimul computassent*, or a compromise. The complaint made by the plaintiff to the messenger could have no effect, as it never was communicated to the defendant. In order to sustain any further claim, the check should have been rejected, or notice

(1) Hawse v. Crowe, Ryan & M. 414.

(2) Bristol v. Wilmshere, 1 B. & C. 514. 2 D. & R. 755.

(3) Mills v. Oddy, 6 C. & P. 728.

given, that it was received only as part payment. A being concluded, B must be so also.(1)

19. Payment is sometimes made by other obligations than negotiable securities, as in the following cases, by *mortgage* or *recognizance*. To an action for the price of a chattel sold to the defendant, he pleaded, that upon the sale the vendor took a mortgage back, and upon forfeiture took possession of the article for the purpose of disposing of it, and that he might have done so and retained the amount due. Held, a good plea. Taking possession of property mortgaged is a satisfaction of the debt, if the former is equal in value to the latter. If fairly sold, and for a sum less than the debt, an action lies for the balance. The case is like that of a sale by the mortgagee of land, under a power; if the price equals the debt, this is thereby paid; if less than the debt, an action lies for the balance; if more, the surplus belongs to the mortgagor. A re-entry alone, without any sale, is payment, if the property is of sufficient value. In case of a chattel, the mortgagee gains an absolute title upon breach of condition.(2)

20. A applied to B to purchase goods, and offered in payment a recognizance of debt entered into by C, who was at the time in doubtful credit, paying only such debts as he chose to. B hesitated to take the recognizance, but finally consented to do it, if C or his wife so desired. Thereupon A went away, and returned the next day, with the false statement that C's wife wished B to take the recognizance. A few days afterwards, B, discovering the fraud, wrote to A that he would have nothing to do with the recognizance, but that he (A) must come and pay for the goods or be sued; but there was no proof how this letter was sent, or whether it ever reached A. In the course of the same month, A sent for a part of the property purchased, which had not been previously taken, but B refused to deliver it, and sent back word, which A received, that he had been deceived, and should bring a suit for the part already delivered, unless A came and paid for it. Eleven months after the sale, B brings an action for goods sold and delivered, send-

(1) *Davenport v. Wheeler*, 7 Cow. 231.

(2) *Case v. Boughton*, 11 Wend. 106.

ing back the recognizance by the officer who served the writ. Held, the action did not lie. It seems, the fact that the writ was made, and the suit therefore commenced before giving up the recognizance, would be a sufficient bar.(1)

21. Where a creditor purchases goods from his debtor, to be paid for in cash, he may still claim to offset his demand to a suit for the price of the goods. The prior debt is treated as a virtual payment of the price.(2)

22. A ordered goods from B, to be paid for in cash ; but in payment he returned to the agent of B an acceptance of B, which had been previously dishonored. The agent at first refused the acceptance, but afterwards took it to B, who retained it in his possession. B having become bankrupt, his assignees bring an action for the price of the goods against A. Held, the above facts were equivalent to payment, or a good ground for set-off, there being no fraud ; and that the action would not lie.(3)

23. Where a *bought and sold note* states that payment is to be made *by bill*, generally, the vendor cannot be allowed to show that this means *by approved bill*. And if this construction is adopted, the expression must mean a bill to which there is *no reasonable objection*. Otherwise, the vendor might reject it according to his interest or caprice, while the vendee would be absolutely bound.(4)

24. By the terms of an auction sale, the vendee was to give approved indorsed notes at six months. It seems, the vendor may disapprove and reject the notes offered, unless he knows or has evidence furnished him, that they are good, and such as a prudent and discreet man would accept under the circumstances of the case.(5)

(1) Norton v. Young, 3 Greenl. 30.

(2) Eland v. Karr, 1 E. 375. See Fair v. M'Iver, 16 E. 130.

(3) Mayer v. Nias, 8 Moore, 275. 1 Bing. 311.

(4) Hodgson v. Davies, 2 Camp. 530. Guier v. Page, 4 S. & R. 1.

(5) Hicks v. Whitmore, 12 Wend. 543.

CHAPTER V.

SALE ON CREDIT.

1. *Credit must be strictly proved.*
2. *When an agreement for credit is not binding.*
4. *Contract of sale or return.*
5. *When a credit expires.*
7. *Agreement to pay by bill, &c. on time ; when an action lies immediately.*
18. *Election as to credit.*
25. *Commencement of suit, time of.*

1. Where an action for goods sold and delivered is resisted on the ground of an unexpired credit, this fact must be made out with perfect clearness, before the Court will set aside the writ on motion.(1)

2. If, *after* the sale of goods, the vendor voluntarily, without consideration, gives time for payment, or if the sale is not *bona fide*, notwithstanding a credit in the first instance ; a suit may be brought immediately.(2)

3. But it has been held, that where goods are sold on credit, no suit lies immediately for the price, though they were purchased, not in the fair way of trade, but to be immediately re-sold at an under price, and with no intention of paying for them. If these facts prove fraud, no property passed to the vendee, and

(1) *Lamb v. Pegg*, 1 Dowl. P. C. 447.

(2) *De Symons, v. Minchwich*, 1 Esp. 430.

the vendor might maintain *trover* ; but by bringing *assumpsit*, he affirms the contract, of which the credit formed a part.(1)

4. Where goods are furnished on a contract of *sale or return*, and no time is mentioned, a reasonable time shall be allowed, taking into view the usual course of dealing in this particular trade. After the expiration of this time, the party furnishing the goods may recover the price in an action for goods sold and delivered.(2)

5. Where a certain time of credit is fixed, though in connection with other acts or events relating to the vendee, the vendor may bring an action at the expiration of the time, whether such acts have been done, or such events have happened, or not.

6. A agreed to do certain work for B by a certain time, payment to be made on completion of the work. A afterwards applied to C to sell him goods, stating his contract with B, and desiring C to wait for payment, till the job should be completed and payment made. At the expiration of the time when the work was to be finished, C demands payment, although it had neither been completed nor paid for. Held, C might sustain an action for the price of the goods.(3)

7. Where payment for goods sold is made, or agreed to be made, by bill or note given *on time*, and such instrument is not given, or fails from any cause to be an effectual security ; the question often arises, whether the vendor may immediately maintain an action upon an implied contract for the price. Upon this subject, the cases are somewhat contradictory.

8. In case of a sale of goods, with an agreement to give a bill immediately, payable on time ; if the bill is neither given nor demanded, no action lies for goods sold and delivered before the bill agreed for would become due. Till then, the contract is *executory* ; and the amount to be paid is not ascertained.(4)

9. But, in another case, the vendee of goods refused to accept a bill drawn for the purpose of payment, and the vendor brought an action, declaring upon the bill, and also for goods sold and

(1) *Ferguson v. Carrington*, 9 B. & C. 59.

(2) *Bailey v. Gouldsmith, Peake*, 56.

(3) *Dana v. Mason*, 4 Verm. 368.

(4) *Hoskins v. Duperoy*, 9 E. 498.

delivered, before the credit on the bill would have expired. Held, the plaintiff had the right to treat the bill as a nullity, and might recover on the latter count; and that he need prove only a presentment to the vendee for acceptance, without showing a protest or notice to the drawer.(1)

10. It is said, that where a debtor gives a bill or note on time for the debt, no action lies upon the debt till this time has expired. Otherwise, where the instrument is of no value, as where it is a bill, drawn upon one having no effects of the drawer, and who refuses acceptance. In such case, it is mere waste paper.(2)

11. Agreement to pay for goods by a bill at two months, to be given after one month from the sale. After the expiration of three months, the vendor brings a suit for the price. Held, the above agreement need not be specially declared on.(3)

12. Sale at two months' credit, to be paid for by a bill at twelve months. At the expiration of fourteen months, an action for goods sold and delivered may be brought.(4)

13. Agreement to pay for goods by a bill at three months. The vendee refuses to accept such bill. An action for goods sold and delivered does not lie before the expiration of the three months; but only an action for non-acceptance of the bill. And, it seems, even after the three months have expired, the action must be brought upon the special contract. In giving judgment upon this case, Ld. Alvanley stated it as his own first impression, that where a special agreement is *collateral*, an action lies upon the general counts. The contract is for a sale, with condition that if the vendee give a bill at two months, he shall have two months' credit. The condition being broken, the vendor is remitted to his original action. But he yielded this opinion to the weight of authority the other way (5)

14. A person, having been discharged as an insolvent debtor, afterwards agreed to pay for goods purchased before such dis-

(1) Hickling v. Hardey, 1 Moore, 61. 7 Taun. 312.

(2) Stedman v. Gooch, 1 Esp. 5.

(3) Heron v. Granger, 5 Esp. 269.

(4) Brooke v White, 1 N. R. 330. Marshall v. Poole, 13 E. 98.

(5) Lee v. Risdon, 2 Marsh. 495. Dutton v. Solomonson, 3 B. & P. 582.

charge, partly in cash, and partly by bills of exchange. Upon non-performance of this agreement, held, *indeb. assump.* did not lie, at least before the bills would be due. The declaration should be special.(1)

15. In the following case, it is attempted to establish a distinction, which will tend to reconcile the foregoing contradictory decisions.

16. Agreement to pay for goods sold in three months, by a bill at five months. The vendee, at the end of the three months, does not give the bill, as promised, and the vendor brings an action against him for goods sold and delivered. Held, the transaction was in effect a credit for five months, and the action would not lie; though a special action on the case might be brought, for not giving the bill. The terms of the contract did not create a *condition*, upon the performance of which further credit was to be given; but the giving of the bill was to be for the benefit of the vendor, that he might have a negotiable instrument, and the additional security of a third person. The case is unlike that of a sale, and taking a bill on time in payment, but without any direct agreement for a credit in paying for the goods. In such case, upon dishonor of the bill, the vendor may sue immediately for the price of the goods. (Ld. Ellenborough, Ch. J., *dissen.*)(2)

17. So, in the former case, after the expiration of the five months, *indeb. assump.* lies.(3)

18. Cases often occur, where the existence and duration of a credit are made to depend upon the election of one of the parties to the sale.

19. Sale on a credit of six or nine months. The vendee not having paid at the end of six months, held, this was an election by him to pay at the end of nine, and no present debt existed till the expiration of the latter period.(4)

20. Sale of goods on the following terms—"7 1-2 per cent. discount, bill at three months, 10 per cent. discount, cash in 14

(1) *Campbell v. Sewell*, 1 Chit. 609.

(2) *Mussen v. Price*, 4 E. 147.

(3) *Miller v. Shawe*, 4 E. 149.

(4) *Price v. Nixon*, 2 Rose, 438.

days." Held, the vendor could not maintain an action for goods sold and delivered within 14 days, even though the sale was effected by means of a fraud on the part of the defendant, which would sustain an action of *trover*. The plaintiff cannot substitute a new contract of sale. The legal construction of the agreement was, that the defendant had fourteen days to elect, whether he would pay in cash at the expiration of that period, or by a bill; and the jury found that he elected a credit. During the fourteen days, he was not liable to pay on request. The printed paper was in the nature of an offer by the plaintiff, either that the defendant should pay in cash after the fourteen days, or give a bill at three months. The only difficulty would be, to determine what should be the term of credit, if neither the cash were paid nor the bill given. But, the action being brought within the fourteen days, this question became immaterial.(1)

21. Sale of goods on a credit of three months; with an agreement, that if the vendee should desire a longer time, the vendor would, at the expiration of three months, take a bill payable in three months more. Three months from the sale having expired, and the vendee not giving the bill, the vendor sues for the price of the goods. Held, the action was well brought.(2)

22. Sale of goods on a credit of six months; payment to be then made by a bill at two or three months at the option of the vendee. Held, this amounted to a credit of nine months. Hence a suit, commenced within six years from the expiration of nine months, was not barred by the statute of limitations. But Parke, J., thought, that the agreement was substantially to pay by a bill after six months, and, no bill being given, that the contract was broken, and the credit at an end.(3)

23. At an auction sale, a condition of which was, that there should be a credit of ninety days with good security, an article was struck off to the defendant, and he removed it a short distance in the room, but afterwards refused to take it or give security. Held, *indebitatus assumpsit* did not lie against him till

(1) *Strutt v. Smith*, 1 Crompt. Mees. & R. 312.

(2) *Nickson v. Jepson*, 2 Stark. 227.

(3) *Helps v. Winterbottom*, 2 Barn. & Ad. 431.

the expiration of ninety days. The removal was merely an act which might amount to *acceptance* at the election of the vendor; it would not justify the defendant in taking the thing without security. But even if the vendor so elected, still the sale must be taken to have been under the special contract, and not to justify an action till the credit expired.(1)

24. The inquiry often becomes important, whether a suit against the vendee was commenced before or after the expiration of the credit agreed upon.

25. In case of a sale of goods on credit, a suit being brought for the price, the special memorandum showed, that the bill was filed after, though the writ was issued before, the credit expired. Held, the action was maintainable. The issuing of the writ was merely the process to bring in the party; the filing of the bill was the commencement of suit. It seems, if the defendant had been arrested before the credit expired, he would have had a right of action.(2)

26. The plaintiff brings an action of debt for goods sold, alleging that they were to be paid for on request. Plea, that the defendant was never indebted as the declaration alleges. Held, (under the new rules of pleading) the defendant could not prove under this issue a credit unexpired at the commencement of suit.(3)

(1) *Parker v. Mitchell*, 5 N. H. 165.

(2) *Swancott v. Westgarth*, 4 E. 75.

(3) *Knapp v. Harden*, 1 Gale, 47.

CHAPTER VI.

SALES AT AUCTION.

SECTION I.—WHAT CONSTITUTES AN AUCTION OR A SALE AT AUCTION.

1. *What is an auction.*
6. *What is an auction sale.*
7. *Purchase of several articles, whether one contract.*

SECTION II.—THE STATUTE OF FRAUDS, AS APPLICABLE TO AUCTIONS.

SECTION III.—RIGHTS, DUTIES AND LIABILITIES OF AUCTIONEERS, PARTICULARLY IN RELATION TO DEPOSITS.

1. *Consequences to the auctioneer of violating his duty.*
4. *Rescinding of sale by an auctioneer.*
6. *Safe keeping of goods.*
7. *Liability to true owner of goods sold.*
8. *Delivery without payment.*
9. *Rights, &c. in regard to deposits.*
18. *Personally liable, where the principal is unknown.*
19. *Action against a purchaser.*

SECTION IV.—WHAT AVOIDS AN AUCTION SALE.

1. *Misrepresentation.*

8. *Puffing.*

26. *Unfair means to reduce the price.*



SECTION I.—WHAT CONSTITUTES AN AUCTION.

1. This question has often arisen, but seems to be still somewhat unsettled.*

2. It seems, the auction duty is incurred, though the sale be imperfect.(1)

3. At an auction sale, the vendor invited each bidder to put two sums upon a slip of paper, and, on comparison, the highest bidder to be declared the purchaser at the lowest of his sums, if exceeding the highest bid of any other person. Held, this was an *auction*, under St. 19 Geo. 3, c. 56, and the penalty incurred for selling without license, though the purchase was never completed.(2)

4. An estate was set up for sale at auction, and an *upset* price stated. No bids being made, the agent, acting as auctioneer, gave notice to the company present, that he would sell the estate privately. Soon afterwards some of them called him into another room, and made offers in writing, he agreeing that the highest above the *upset* price should be the purchaser, which was accordingly done. Held, this was an *auction*, within the meaning of the statute 17 Geo. 3, c. 50, 19 Ib. c. 56, and the expression, “any other mode of sale at auction, or whereby the highest bidder is deemed the purchaser;” meaning by the last clause to give a definition of the word *auction*.(3)

5. The agent of the owner of an estate put it up at auction, first in a number of lots at certain prices. No bid being obtained, he offered it in a smaller number of lots at other prices.

(1) Jones v. Nanney, M'Clel. 25. 13 Price, 76.

(2) Rex v. Taylor, M'Clel. 362. 13 Price, 636.

(3) Walker v. Advocate, &c. 1 Dow, 111.

* It will be seen that some of the cases hereafter cited relate to real estate. But they are equally applicable to sales of chattels.

Still obtaining no bid, he withdrew the property. Held, this was not a bidding of the owner by his agent, which subjected the party to payment of a duty for want of notice to the auctioneer of the agency. The *upset* price was merely the *terminus* from which a bidding commenced.(1)

6. A bidder at auction may retract his bid, before the hammer is down. The auctioneer is the agent of the vendor only. The assent of both parties is necessary to make a binding agreement; but knocking down the hammer, alone expresses that of the vendor. An auction has been properly called *locus penitentiæ*. A bid is a mere *offer*, not binding on either side till assented to. If it were otherwise, one party would be bound, and not the other. Upon these grounds, an action does not lie, against a bidder who has refused to complete his purchase, but who afterwards buys at a reduced price, to recover the difference. Where a memorandum in writing is necessary to bind the bargain, it seems, the bidder may retract at any time before the auctioneer makes such memorandum. But he must do it in so loud a tone as to be heard by the auctioneer.(2)

7. Where the same person buys at an auction several lots, for different sums; the contracts are separate in law and fact; and, in a special action on the case for refusing to adhere to the conditions, cannot be consolidated into one.(3)

8. Goods sold at auction were knocked down in several lots to one bidder, and his name written against them on the catalogue. Held, this was a distinct contract for each, and hence a subsequent memorandum of an agreement to purchase them required no stamp, the value of each lot being under £20, though the whole together exceeded this amount.(4)

(1) *Cruso v. Crisp*, 3 E. 337.

(2) *Payne v. Cave*, 3 T. R. 148 4 Bing. 653. 3 T. R. 653. *Jones v. Nanney*, M'Clel. 25.

(3) *James v. Shore*, 1 Stark. 426. 2 Taun. 38.

(4) *Roots v. Dormer*, 4 Barn. & Ad. 77. 1 Nev. & M. 667.

SECTION II.—THE STATUTE OF FRAUDS, AS APPLICABLE TO AUCTIONS.

1. The question has been often raised, whether auction sales are within the Statute of Frauds, requiring a memorandum in writing to bind the bargain; and, if so, what is a sufficient compliance with the requisitions of the Statute. Upon these points, very eminent judges have expressed contradictory opinions.

2. It was remarked by Ld. Mansfield, that the solemnity of an auction sale precludes all perjury as to the fact of the sale; and he expressed it as the inclination of his present opinion, that auctions in general are not within the statute. Wilmot, J. was inclined to think, that sales by auction, openly transacted before five hundred people, were not within the statute. But in a subsequent case, Ld. Ellenborough remarked, that with all due deference it was no sufficient reason to dispense with the statute, merely because the *quantum* of parol evidence diminishes the danger of perjury. The same argument would apply to all sales in market overt. If we get loose from the words of the statute, the question turns upon the *quantum* and degree of danger of perjury, the time of sale, and the number of persons present. This construction would render the statute more mischievous than beneficial to the trading world. He concluded by saying, that he was not prepared to say that sales by auction were not within the statute, or to give a conclusive opinion to the contrary.(1)*

3. Upon the point, whether an auctioneer is to be considered the agent of both seller and purchaser, so as to make his memorandum a sufficient signing under the statute; it is said to have been uniformly so held since the case of *Simon v. Motivos*. It would be dangerous to break in upon a rule affecting a broker's sales, where a memorandum in his book, and bought

(1) *Simon v. Motivos*, 1 Bl. R. 599. *Hinde v. Whitehouse*, 7 E. 568.

* It is held in Massachusetts that auctions are within the Statute. *Davis v. Rowell*, 2 Pick. 64. See *Statute of Frauds*.

and sold notes transcribed therefrom and delivered respectively to the buyers and sellers, have been held a sufficient compliance with the statute. All great transactions of the city (of London) are thus conducted; and it is too late to question the practice.(1)

4. Certain sugars, deposited in the king's warehouse, under locks of the king and the owner, and not removable till payment of the duties, were advertised to be sold at auction, Sept. 20. Samples of half a pound from each hogshead, drawn out after weighing at the king's beam, and fixing the duties accordingly, were shown to the bidders. The auctioneer had before him a printed catalogue, containing the lots, marks and number of hogsheads, and the gross weight. Written conditions of sale were also read, as applying to the sugars in the catalogue, but the two papers were not annexed, and did not refer to each other. The auctioneer wrote on the catalogue the name of the purchaser, and the bid for each lot, first remarking that the duties were unpaid, and to be paid the next day by the vendor. The biddings having closed, samples were delivered to, and accepted by the purchaser, according to usage, as a part of his purchase, and to make up the quantity marked as weighed. Sept. 22, before the duties could be paid, without default of the vendor, the sugars were burnt. Held, by the principles of the common law, the auction sale passed the property, such being the intention of the parties, though it was known that payment of the duties was a necessary preliminary to delivery, and the vendee must bear the loss; that if the Statute of Frauds was applicable to auction sales, then delivery and acceptance of the sample were sufficient to pass the property; and (it seems) that the auctioneer was the agent of both parties, and his signature therefore equivalent to theirs.(2)

5. A brig was sold by auction at the Merchants' Exchange in New York. Immediately after the sale, the auctioneer went to his counting-room in a different building in the same street, and made the entries in his sale-book. Held, insufficient to

(1) *Hinde v. Whitehouse*, 7 E. 569.

(2) *Hinde v. Whitehouse*, 7 E. 558.

bind the bargain. A memorandum must be made in the sale-book at the time and place of sale. It is not enough to minute in pencil-marks at the place of sale the sums and the name of the vendee, though followed immediately by a formal and legal entry at another place. And it seems, in New York, the entries should be made in a sale-book, used exclusively for that purpose.(1)

6. In New York, it is provided by Statute, that in case of auction sales, the auctioneer shall enter the name of the person on whose account the sale is made. Under this provision, it is sufficient to enter the name of an agent, consignee, or any person having authority to sell the goods. And the true owner may maintain an action upon the contract, though not named in the entry.(2)

SECTION III.—RIGHTS, DUTIES AND LIABILITIES OF AUCTIONEERS, PARTICULARLY IN RELATION TO DEPOSITS.

1. If an auctioneer deviate from the strict terms of the conditions, he must personally suffer the consequences; being liable for the duties, and not entitled to maintain any action against the vendee. In case the auctioneer has fulfilled his duty, he may maintain an implied assumpsit against the vendor; and the latter has a claim against the purchaser, upon the express agreement arising from the conditions of sale.(3)

2. The plaintiff, an auctioneer, brings special assumpsit against the highest bidder at a sale of land, to recover money paid by him to the excise collector for the auction duty. The conditions of sale provided that the purchaser should pay the duty; but, in consequence of the plaintiff's having neglected to set down the name of the defendant, the sale was not legally binding. Held, neither special assumpsit, nor an action for

(1) Hicks v. Whitmore, 12 Wend. 548.

(2) *Ib.*

(3) Jones v. Nanney, 13 Price, 76.

money paid, would lie. And, it seems, the plaintiff could not recover the duty from the vendor.(1)

3. Where an auctioneer forfeits his bond to the Crown, by neglecting to pay the duties at the time stipulated, the penalty becomes absolutely due, and is not a mere security to compel an account, to be satisfied by payment at a subsequent period. Auctions are considered by the law as cash transactions. And as the receipts from this source are applied to the dues of the army and navy, which must be punctually met, mere interest can be no adequate compensation for delay.(2)

4. An auctioneer has no right to rescind a sale without authority from the vendor.

5. An auctioneer, having sold a horse, upon the complaint of the vendee that he did not correspond with the advertisement, and would not draw, rescinded the sale. In an action brought by the owner of the horse against the auctioneer upon this ground, held, the plaintiff was not bound to show any express agreement by the defendant not to rescind; but the burden was on the defendant, to offer some excuse for doing it.(3)

6. An auctioneer is liable for the want of such care of goods entrusted to him for sale, as he takes of his own property; not for unavoidable accidents.(4)

7. Where an auctioneer is notified that his principal does not own the property sold, he is personally liable, in an action for money had and received, to the true owner, for the proceeds of sale. Under these circumstances he becomes himself a *quasi* principal.(5)

8. Where an auctioneer delivers goods sold by him, without receiving payment in full, he is liable to the vendor for not giving an accurate account of the proceeds.(6)

9. Questions often arise, respecting the duty and liability of an auctioneer, in relation to a *deposit* made by the purchaser, conformably to the conditions of sale.

(1) Jones v. Nanney, 13 Price, 76.

(2) Rex v. Christie, 2 Anst. 536.

(3) Nelson v. Aldridge, 2 Stark. 435.

(4) Maltby v. Christie, 1 Esp. 340.

(5) Hardacre v. Stewart, 5 Esp. 103

(6) Brown v. Stadton, 2 Chit. 353.

10. Where a purchaser of property at an auction sale rescinds the bargain in consequence of an objection to the title, and the concealment of material facts, he may recover a deposit from the auctioneer, no proof being offered that it has been paid over to the vendor. And the auctioneer would have no right thus to pay it over, till completion of the sale.(1)

11. An auctioneer received a deposit from the vendee, in presence of the vendor, signed an agreement acknowledging the sale, and engaged to complete it; but, by reason of a defect in the title, the sale was not completed. Held, the vendee might recover the deposit from the auctioneer, though paid over to the vendor before discovery of the defective title, and though the vendee had given him no notice against paying it over.(2)

12. It is said that, where an auctioneer receives a deposit, it seems, he is a stakeholder, and not the agent for both parties. He is liable at all events, till the contract is completed. And his knowledge of the defective title is equivalent to an express notice not to pay over. The deposit is a conditional payment, and should not be parted with till the conditions are fulfilled. In this case, the auctioneer, upon a demand from the vendee, neglected to inform him that he had paid over the money to the vendor, and thus led the plaintiff to bring the present suit.(3)

13. The title of an estate sold at auction being objected to, the auctioneer refused to return the deposit, and was compelled to pay the costs of a suit brought against him. Held, he could not recover the amount from the vendor, in an action for money paid, but must declare specially.(4)

14. Where a suit is brought against an auctioneer for a deposit paid him, he cannot file a bill of interpleader, if he insists upon retaining a commission or duty.(5)

15. Sale of houses at auction, according to certain particulars and conditions, one of which was, that an abstract of title be delivered within ten days, and another, that a deposit be paid

(1) *Burrough v. Skinner*, 5 Burr. 2639.

(2) *Gray v. Gutteridge*, 3 C. & P. 40.

(3) *Edwards v. Hodding*, 1 Marsh, 377. 5 Burr. 2639.

(4) *Spurrier v. Elderton*, 5 Esp. 1.

(5) *Mitchell v. Hayne*, 2 Sim. & St. 63.

the auctioneer. A purchaser of two houses paid the deposits, signed an agreement as purchaser, and took a receipt from the auctioneer, as for payment of a deposit upon the auction sale of the premises named in the particulars, &c. The abstract not being delivered, the vendee brings an action against the auctioneer for his deposit, and offers in evidence the receipt and conditions of sale, but not the agreement signed by himself. Held, the evidence was insufficient to maintain the action.(1)

16. A vendee at auction paid to the auctioneer a deposit as part of the price, until the title should be made out. Held, the auctioneer was not liable for interest upon the amount, though four years had elapsed since the sale, no demand of payment having been made upon him.(2)

17. An auctioneer, as agent for the vendor, agreed to sell upon the terms of printed conditions, according to which the vendee was to pay down a deposit, and the duty, and the remainder of the price at a certain day, upon receiving a good title, and the vendor was to prepare and deliver to the vendee an abstract of title. There being a defect in the title and a consequent failure of the contract, held, the auctioneer was not liable to pay interest upon the deposit and duty, unless the money had been demanded, or notice given him that the bargain was rescinded. It was no part of his duty to tender the money, which he received as a stakeholder, and was therefore not bound to return, till notified that the contract was at an end, and that his character as stakeholder had ceased. It would be otherwise, if the auctioneer had not stated that he was agent for the vendor.(3)

18. Where an auctioneer does not disclose the name of his employer, he is personally liable to a vendee for not fulfilling the contract of sale.(4)

19. An auctioneer may maintain an action for goods sold and delivered against a vendee, though the sale took place at the house of the vendor, who was also known to be the owner. An

(1) *Curtis v. Greated*, 3 Nev. & M. 449. 1 Ad. & El. 167.

(2) *Lee v. Munn*, 1 Moore, 481.

(3) *Gaby v. Driver*, 2 Younge & Jer. 549.

(4) *Hanson v. Roberdeau*, Peake, 120.

auctioneer has the possession, coupled with an interest, not a bare custody, like a servant or shopman. He has a special property in the goods—a lien for charges, commissions and duties. If he gives credit, it is at his own risk; and in this he differs from a factor, who does not incur such liability, unless of the *del credere* class. So if the goods should be stolen, the auctioneer might maintain trespass or an indictment. In this case, the vendor, though owning the premises where the sale took place, gave actual possession of them to the auctioneer for this purpose, and not a mere *authority*. Mr. Justice Wilson doubted, how far a notice from the vendor to the purchaser not to pay the auctioneer would be a bar to any suit by the latter. But, after taking and enjoying the goods, the defendant is estopped to deny that the auctioneer had a right to sell.(1)

20. An auctioneer may recover the price of goods sold, after accounting for it to his employer, though the vendee has a demand against the latter, a receipt for which he has handed to the auctioneer for the purpose of payment.

21. The purchaser of goods at auction handed to the auctioneer a receipt from himself (the purchaser) to the owner of the goods, for a debt due from the latter. The auctioneer doubted whether to accept it, and in the mean time the purchaser drove off. The vendor declining to take the receipt in payment, the auctioneer paid him in money, and brings an action for goods sold and delivered and money paid, against the purchaser. Held, the action was maintainable.(2)

22. But where the vendee has a claim against the nominal vendor, and makes a settlement with him without having been forbidden so to do by the auctioneer, the latter cannot sue for the price, although in fact the nominal vendor was only a part-owner.

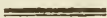
23. Goods belonging in part to A and in part to B, were put up at auction at the house of A. They were also entered at the excise in A's name, and the catalogue spoke of them as all belonging to him. C, who held an acceptance of A, purchased

(1) *Williams v. Millington*, 1 H. Bl. 81

(2) *Ib.*

some of the goods, without notice that they belonged in part to B, and afterwards made a settlement with A. The auctioneer allowed C to take the property, gave him no injunction against making payment to A, and afterwards brings a suit for the price against C. Held, he could not recover either for the goods which belonged to A, or those which belonged to B. Also, that in case there had been no settlement between A and C, the latter might set off in this action his demand against the former.(1)

24. Where goods are sold at auction upon credit, and the purchaser refuses to take them, the owner may maintain an action against him in his own name, before the term of credit has expired, for breach of contract ; and the measure of damages will be the difference between the price agreed on, and the value of the property at the time of the defendant's refusal to take it. The amount of such difference may be determined by a re-sale at the vendee's risk. But the jury will not be bound by the result of a re-sale, if any other more satisfactory measure can be resorted to.(2)



SECTION IV.—WHAT AVOIDS AN AUCTION SALE.

1. One of the most common grounds for avoiding a sale at auction, is that of some misrepresentation, made by the vendor or his agent, with regard to the property sold. Most of the cases on this subject relate to sales of *real property* ; but, the principles involved in them not depending at all upon this circumstance, they may properly be cited as equally applicable to sales of chattels.

2. An auction sale was made upon the condition, that any mistake in the description or particulars of the property should not annul the sale, but be matter of compensation. The pro-

(1) *Coppin v. Walker*, 2 Marsh. 497.

(2) *Girard v. Taggart*, 5 S. & R. 19. 539.

posals further set forth, that "plot marked A cannot be identified by the vendor, because a certain person is dead, but [it] is presumed the vendee will be able to find it." They also spoke of "a substantial brick building" on the premises, and represented the property as estimated to rent at £35. It was proved that the above plot could not be found, that there was no substantial brick building, and that the property would not rent for one half of £35. Held, as a substantial part of the property did not exist or could not be found, and as the representations in regard to it were *mala fide* and greatly exaggerated; the clause providing for compensation did not apply, but the sale was void, and the vendee might maintain an action to recover his deposit.(1)

3. The particulars of an auction sale stated the property as held under the C estate upon three lives, and one of the conditions was, that a misdescription or misstatement should not vitiate the sale, but merely be a ground for compensation. In an action to recover a deposit, it appeared that one life had dropped before the sale, and that the property was not held directly under the C estate. Held, the defendant could not prove, in bar of the action, a declaration made by the auctioneer, before the sale, that this life had dropped; but he might prove, that the plaintiff before the sale had read the original lease.(2)

4. Auction sale of a public house. The particulars described the premises, as held for an unexpired term at £55 rent, and, among other things, embracing a yard. By the conditions, the contract was to be completed on June 25th, and any error of description was to be a matter of compensation, to be settled by the award of arbitrators. In point of fact, the yard was not held under a lease, but by tenancy from year to year, at a farther rent of £10. The vendor obtained a lease of the yard for the same term with the other premises, at the farther rent of £8, dated June 23, but executed long after June 25. The yard was proved necessary to the enjoyment of the premises. Held, the provision for a compensation was inapplicable to the above variation from the contract, and that it authorized the vendee to

(1) Robinson v. Musgrove, 2 Moo. & R. 92. Dykes v. Blake, 6 Scott, 320, acc.

(2) Bradshaw v. Bennett, 5 C. & P. 48.

rescind the sale, although there was no proof that the defect was known to the vendor.(1)

5. In an action against an auction purchaser for not completing the sale, the printed conditions of sale cannot be contradicted by the verbal declarations of the auctioneer at the time, in order to disprove the charge of misrepresentation.

6. Thus, where the conditions were, that the property was "free from all incumbrances," when in fact there was a charge upon it of £17 per annum, which the auctioneer declared, but not to the vendee individually; held no action would lie against the latter for not completing his purchase.(2)

7. The plaintiff brings an action for the price of certain growing crops sold to the defendant. The plaintiff purchased these crops at auction. The auctioneer sold, according to a printed paper, *lot No. 6*, being "ten acres of spring wheat," &c. Also *lot No. 15*, "the keep of George's field until old Michaelmas day next." There was a memorandum at the bottom of the paper, as follows—"the keep of all the fields, &c. will be sold with the crops, except George's field." The auctioneer made a verbal declaration, with respect to *lot No. 6*, that it was not spring wheat, and the *keep* was not to be sold. The lot was knocked down to the plaintiff, and his name written as the purchaser. The plaintiff then retired from the room with the defendant, and on his return gave notice that the defendant had purchased the lot, and the defendant, in presence of the plaintiff, requested to have his name substituted for the plaintiff's which was accordingly done. In an action against the defendant for not completing his bargain with the plaintiff, held, the written memorandum could not be controlled by the verbal declarations of the auctioneer, and, as the former was not fulfilled, the action could not be sustained.(3)

8. The most common ground of objection to auction sales, is the circumstance of the vendor's secretly employing some one

(1) *Dobell v. Hutchinson*, 5 Nev. & M. 251. 3 Ad. & El. 355.

(2) *Gunnis v. Erhart*, 1 H. Bl. 289. (See *Powell v. Edmunds*, 12 E. 6. *Slark v. Highgate*, &c. 5 Taun. 792.)

(3) *Shelton v. Levius*, 2 Crompt. & J. 411.

to bid on his own account, for the purpose of enhancing the price of the property. This is commonly called *puffing*.

9. The prevailing doctrine on this subject is, that a sale at auction is avoided by the owner's employing a bidder. The leading case in which this principle is established is the following, decided by Lord Mansfield.(1)

10. The owner of a horse, sold at auction, directed the auctioneer not to sell it under a certain sum. Held, no action could be maintained against the auctioneer for violating this direction, because it would be illegal to obey it. It would be otherwise, if the direction were not to *put up* the horse under a certain sum. In this leading and often controverted case, Ld. Mansfield remarked, upon the practice of employing bidders for the owner, that the frequency of such practice was no argument in its favor, for the same might be said of gaming, stock-jobbing and swindling. The auctioneer may bid for a third person, but not for the owner.(2)

11. In another case, the same principle is thus stated. Where all the bidders at an auction, except the purchaser, bid for the vendor without notice, and the vendee is thereby induced to give for the property more than its value; the sale is void in law and Equity.(3)

12. In another case, the same rule is stated with slight qualification.

13. Where the owner of property, sold at auction, employs only a single person (it seems) to bid for him, up to a certain specified sum; this avoids the sale, unless it was publicly announced at the time. If two persons are employed, the sale is certainly void.(4)

14. Upon this subject, Ld. Kenyon uses very strong language. He says "the whole transaction is bottomed in fraud—it is fraud from beginning to end." "The whole of Ld. Mansfield's reasoning (in *Bexwell v. Christie*, Cowp. 395,) is founded on the

(1) *Crowder v. Austin*, 3 Bing. 368. 6 T. R. 642

(2) *Bexwell v. Christie*, Cowp. 395.

(3) *Bramley v. Alt*, 3 Ves. Jun. 624.

(4) *Wheeler v. Collier*, M. & M. 125.

noblest principles of morality and justice, and calculated to preserve honesty between man and man." He further remarks, that if this had been the first case, perhaps he should have hesitated; but "Ld. Mansfield's comprehensive mind saw it in its true colors," &c.(1)

15. The plaintiff and B were appointed by the will of C, trustees to make sale of his lands. They were accordingly sold at auction after public notice. D, the counsel of the plaintiff, bid £1750, and the defendant £1751. D was a by-bidder, who declared that he did not want the land, and advised the defendant to purchase it. Held, if D was employed by the trustees as a by-bidder, and the defendant was ignorant of it before making the purchase, and if D bid in order to enhance the price for the benefit of the trustees, the sale was void.(2)

16. At an execution sale, the debtor employed two persons to bid up to close \$2000. The defendant became the purchaser, but refused to take the property, and it was sold again at his risk and at a loss of about \$400. In an action against the defendant to recover the amount of this loss, held, the sale was void. (But the jury found for the plaintiff \$40.) (3)

17. Property was seized under an extent by an agent of the crown, to whom a bid was reserved by the conditions of sale. A puffer was employed at the sale. On application by the Crown to enforce the contract, it was contended that the vendee could not object to the sale on this ground, because he did not come into Court *with clean hands*, it being proved that he had colluded with the tenant who claimed the property, and had bid, not for the purpose of purchasing, but in order to obtain an abstract of title. Held, the employment of a puffer still avoided the sale. The plaintiff did not want the aid of Equity, but only that the rules of law should be applied to his case. The misconduct of the vendee did not preclude him from availing himself of the provisions of the law against puffing.(4)

(1) Howard v. Castle, 6 T. R. 642.

(2) Moncrieff v. Goldsborough, 4 Har. & M'Hen. 281.

(3) Donaldson v. McRoy, 1 Browne, 346.

(4) Rex v. Marsh, 3 Younge & J. 331.

18. There are other cases, however, which do not recognize the rule above stated in its full extent.

19. In the case of *Twining v. Morrice*, Kenyon, M. R. says, "I do not say the doctrine in *Bexwell v. Christie* is wrong; but every body knows that such persons are constantly employed." (1)

20. A bill in Chancery alleged, that persons were employed to, and did bid for the owner, in order fraudulently to advance the price above the real value of the property; but did not allege that there was no real bidder. The Ld. Chancellor remarked, that *Bexwell v. Christie* turned upon the fact that there was no real bidder, and that the purchaser refused instantly to complete the contract. It was a *trap-auction*. "The reasoning goes large and does not convince one. It would reduce every thing to a *Dutch auction*, a bidding downwards. I feel vast difficulty to compass the reasoning, that one man does not follow his own judgment, because others bid," &c. The acts of parliament, which make certain exceptions from the auction tax, suppose that the owner may himself bid. They require only a private notice to the auctioneer. The Ld. Chancellor goes on to speak of the doctrines of the civil law and the schools of philosophy upon this subject. He farther remarks, that it is always taken for granted, unless the contrary appears, that there is some person to bid for the vendor. And this practice is beneficial to the public. If it did not prevail, many articles would be sold, such as scarce and valuable books, which three or four persons only would divide among them, and obtain for much less than their real value. (2)

21. At an auction sale, a person bid privately for the vendor, to prevent a sacrifice. The vendor was assignee of a bankrupt. The vendee was not present, but a third person acted for him without previous authority, and the vendee afterwards ratified the purchase. The bid for the vendor immediately preceded that for the vendee. The former bidder was enjoined against exceeding the sum named, upon the ground that if he went be-

(1) 2 Bro. 331.

(2) *Conolly v. Parsons*, 3 Ves. jun. 625 n.

yond this amount, he would be required to take the property. Under these circumstances, a specific performance was decreed against the vendee. Not being present at the sale, he could not have been influenced by competition to bid more than the value. He stood in the situation of an assignee of the purchaser, and in this view it must be a strong case of fraud to avail him against the vendor.(1)

22. In one case, Sir Wm. Grant questions *Bexwell v. Christie*, and regards the opinion as too broad for the facts of the case. He further remarks, that *Howard v. Castle* proceeded upon the ground of fraud. There was no real bidder, and there were several bidders for the vendor. In *Conolly v. Parsons*, (3 Ves. 625) Ld. Rosslyn doubts, whether there can be a fraud of this nature. Sir Wm. Grant is of opinion, that if bidders are employed, not *in defence*, to prevent an under-sale, but to take advantage of the eagerness of bidders, to screw up the price; a Court of Equity would not justify the transaction. So also, where there are several bidders for the vendor.(2)

23. At an auction sale of land, a person bid for the vendor £75 per acre, upon private notice to the auctioneer. After a contest with *bona fide* bidders, the property was sold for over £101, and some days afterwards the vendee paid the duty. He was decreed to perform his contract, with costs.(3)

24. On an action of assumpsit for failure to complete the purchase of a horse, the defendant cannot under the general issue give evidence of an auction sale, and that the vendor employed puffers. There should be a special plea.(4)

25. It has been held in South Carolina, that the employment of a bidder for the vendor is not illegal, although no notice be given, and the price be thereby very much enhanced. Thus, at a sale of land there were *bona fide* bidders up to \$18 or \$20 per acre, after which the bidding was confined to the puffer and the defendant, who purchased the land at \$44. The vendee

(1) *Smith v. Clarke*, 12 Ves. jun. 477.

(2) *Ib.*

(3) *Bramley v. Alt*, 3 Ves. jun. 620.

(4) *Icely v. Grew*, 6 C. & P. 671.

was a good judge of the land, lived in the neighborhood, and was acquainted with the premises, while the by-bidder enjoyed none of these advantages. The latter also communicated openly with the owner. The property was an old family seat, which was sold with reluctance, and merely for the purpose of effecting a division, and for which therefore the owner was justified in securing a large price. Specific performance of the contract was decreed against the defendant. (1)

26. While the law, in favor of a vendee, avoids a sale on the ground of secret measures used to *enhance* the price, it equally aims to protect the vendor, by discountenancing any unfair attempt to obtain the thing sold for *less than a fair price*.

27. Certain brokers mutually agreed, before an auction sale, that only one of them should bid for each article sold, and that all the articles purchased should afterwards be sold among them at a fair price, and the difference between this and the auction price equally divided. Held, this was an indictable conspiracy. (2)

28. At an auction sale of a barge upon execution, the execution creditor stated publicly, that he built it for the execution debtor, who had never paid him. The creditor bid for the barge, and no one bid against him. The auctioneer declining to knock it down to him at the first bid, a friend of the creditor bid upon it, and the creditor then advanced one shilling, upon which the barge was knocked down to him, and he paid a deposit, as part of the price. The article was worth £150, and put up at £50, and the creditor's first bid was £52. The creditor brings *trover* for the barge, the auctioneer having refused to deliver it, and afterwards re-sold it for one hundred guineas. Held, under the circumstances, the plaintiff gained no property in the barge, and a verdict in his favor was set aside by the Court. (3)

29. The owner of an execution, upon which property was to be sold, agreed with other persons to prevent the usual competition at sales of this description, in order to leave a balance

(1) *Jenkins v. Hogg*, 2 Const. S. C. 821.

(2) *Levi v. Levi*, 6 Car. & P. 239. 3 John. Cas. 29. 13 John. 112. 6. 194. 8. 444.

(3) *Fuller v. Abrahams*, 6 Moore, 316.

due upon the execution, and that he might thus seize other lands. The sale was consequently made for a mere nominal price. Held, it was void.(1)

30. At an auction sale, the agent of the vendor bid for the vendee. He was known to be the vendor's agent, began to bid early, and was the only real bidder, except the purchaser. Held, a bill for specific performance could not be sustained by the vendee. The circumstance above mentioned chilled the sale, and prevented the vendor from obtaining so high a price as he otherwise would. Nor did it make any difference, that the persons in attendance regarded the agent as doing what the law would not allow; because, though illegal, the practice was known to be a common one. But, on the other hand, the Court refused to set aside the contract, upon a cross bill by the vendor, leaving the purchaser to his action at law.(2)

(1) *Troup v. Wood*, 4 John. Cha. 228.

(2) *Twining v. Morrice*, 2 Bro. 326.

CHAPTER VII.

LIEN.

1. *General principle ; distinction between sales of chattels and of land ; lien depends on possession ; when lost, notwithstanding possession ; whether the right continues against a second purchaser.*
21. *Effect of part-delivery upon the right of lien.*
24. *Sale on credit.*
27. *Waiver of a lien.*
29. *Lien between part-owners.*

1. When a contract of sale is completed by any of the methods enumerated in the first chapter, the vendee acquires an absolute *right of property*, and a *right of possession* also, subject only to the *lien* of the vendor for the price, if this has not been paid. If the vendee tender the price, and the vendor refuse it, the former may then seize the goods, or have an action against the latter for detaining them. It has been very justly observed, in relation to the acts necessary to constitute a transfer of chattels, that what is sufficient as an *acceptance*, to take the case out of the Statute of Frauds, is not always sufficient to constitute a delivery of the possession. And what is sufficient to vest the property in the vendee, is not always sufficient to deprive the vendor of his lien for the price. (1)*

(1) Long on Sales, (Am. Ed.) 265.

* A lien is said to be neither *jus in re* nor *jus ad rem*, but a simple right of re-

2. The vendor of goods has no lien upon them for the price, corresponding to that of the vendor of land. The lien of the latter, is a doctrine not found in the ancient common law, but belonging to equity, and transplanted from the civil law. There is no case, in law or equity, either in Great Britain or the United States, which holds that after a sale of goods and absolute delivery to the vendee in person, the vendor can reclaim them for non-payment of the price.(1)

3. The right of lien cannot exist without *possession*, notwithstanding an equity in favor of the party claiming it. It has been doubted, whether a mere constructive delivery is sufficient to destroy this right; and perhaps it is too much to say, that in every possible case it would. But, in general, it is immaterial, whether the delivery be actual or constructive. And a party having a lien does not lose it by parting with the possession for a particular purpose, the delivery must be with notice of such lien, and of an intention to retain it.(2)

4. Where there has been a delivery at the time of sale, and security given for the price, but with an agreement that the vendor shall have a claim upon the property till actual payment; his lien is lost, and does not revive by his coming again into possession under the administrator of the vendee.

(1) *Lupin v. Marie*, 6 Wend. 77.

(2) *Parks v. Hall*, 2 Pick. 212. *Clemson v. Davidson*, 5 Binn. 398. 8 Pick. 73. *Heywood v. Waring*, 4 Camp. 291. 3 Price, 547. 1 Glyn. & J. 116. *Hall v. Jackson*, 20 Pick. 198.

tainer. The right depends on *contract*, express or implied. And no such contract can be implied, where a party acts adversely to those for whom he makes a payment. *Meany v. Head*, 1 Mas. 319. *Allen v. Ogden*, 1 Wash. 174. See 2 Camp. 579. 5 Lit. 98. Lit. Sel. Cas. 280. 2 Mer. 404. 4 Taun. 807. 5 M. & S. 180. *Lien* is a tie, hold or security upon things which a party has in custody, till payment of his debt. There can be no lien, where the thing is annihilated, or possession given up voluntarily and without fraud, or where articles are furnished under a particular agreement. So a party cannot claim a lien *against the government*, because not subject to suit, nor strictly a *debtor*. Thus an inn-keeper cannot detain horses used in carrying the mail. *U. S. v. Barney*, 2 Hall's Law Jour. 128. A lien is a personal right, and not assignable. *Daubigny v. Duval*, 5 T. R. 604. It is the same at law and in Equity. *Oxenham v. Esdaile*, 2 Y. & Jer. 493. 2 Mer. 404. It cannot arise from a wrongful act. 2 Selw. 1358. 1 Camp. 12.

5. It was agreed between the vendor and vendee of a coach, that the former should have a claim upon it, if not duly paid for. Four bills of exchange on time were given for the price, and the coach was delivered. The vendee having died, and the bills being unpaid, his administrator sent the coach to the vendor to be repaired, and the latter refused to re-deliver it without payment. The administrator brings *trover* against him. Held, the agreement amounted to a mere *license* from the vendee to the vendor, which was personal to the former, and did not bind his representative. *Hypothecation* is unknown in England. Had the coach been taken from the vendee himself, the contract would have been a bar to any action by him.(1)*

6. A distinction is to be observed, however, between the mere *lien* of a vendor, which is destroyed by delivery, and a *condition* of payment annexed to the sale, which may continue in force, even against subsequent purchasers from the vendee, although recognized by the parties under the name of a *lien*. It is said, the doctrine that the lien of a vendor until payment depends on possession, is applicable only to *absolute* sales.(2)

7. A sold to B a yoke of oxen for a certain price, to be paid at a future time; A to hold them till payment. A allowed the oxen to go into possession of B, who sold to C, and C to D, for a valuable consideration, and without notice of the lien of A. Held, this lien still continued in force, and that A might maintain *trover* against D, even before the period of credit expired.(3) (See *Conditional Sale* and *Conditional Delivery*.)

8. But a somewhat different doctrine seems to be recognized by another case in the same state. A authorized B, as his agent, to sell logs belonging to A; the logs in every event to

(1) See Harrison's Digest.

(2) *Barrett v. Pritchard*, 2 Pick. 515.

(3) *Tibbetts v. Towle*, 3 Fairf. 341.

* Where a policy-broker, having a general lien on the policy of insurance, parted with it, but afterwards came into possession of it again, held, his lien was thereby revived. *Whitehead v. Vaughn Co.* Bt. Laws, 442. Long, 263. See 1 Star. 408. One having a lien upon property, delivered it to a carrier on account and at the risk of his principal, though this was unknown to the carrier. Held, he could not stop *in transitu* and obtain a re-delivery to him, under a bill of lading from the carrier given during the voyage. *Sweet v. Pym*, 1 E. 4.

remain A's property till the price should be paid or amply secured. B sold the logs, and allowed the vendee to take possession without payment; the latter agreeing that the lien of A should continue till payment be made. Held, this sale was not binding upon A, because it varied from the authority given to B, inasmuch as a lien without possession constituted at best an imperfect security, and probably none at all.(1)

9. The following cases, though not all strictly relating to *sales of personal property*, may properly be cited as bearing upon the point of *possession*, above considered.

10. In the autumn of 1825, C contracted with A and B, that they should cut all the pine timber on his land, fit for boards, which any prudent person would cut; carry one quarter part of the logs to D, for C's share, and the other three quarters to the same place, to be sawed and delivered to C, who should remain owner of the whole, till satisfied that his quarter was of the average quality of the whole, and till paid his entire debt by A and B. If they should fail to take the timber the next winter and spring, they were to pay the value of a quarter of what was left; the timber to remain pledged for this part also. A and B did not cut the timber till 1827. Before reaching the place appointed, they sold it to E, being largely in debt to C at the time. C brings replevin. Held, C's lien embraced logs cut after the winter and out of the bounds mentioned; that A and B were special bailees, and had no power to sell, and the sale put an end to their title.(2)

11. A sent a ship for repairs to the yard of B, B agreeing to find timber therefor, which he did, to the amount of £200. The ship being advertised for sale, B forbade the sale until he should be paid. The agent of A assented to this requisition, promised payment from the purchase-money of the vessel, and gave authority to the auctioneer accordingly. C purchased the ship; B immediately demanded payment from him; and he agreed to pay the auctioneer by a certain day. Held, until payment, he could not have trover for the vessel.(3)

12. Lease of land from A to B. A to have a hold or lien on

(1) Cowan v. Adams, 1 Fairf. 374.

(2) Emerson v. Fisk, 6 Greenl. 200.

(3) Norris v. Williams, 1 C. & M. 842.

the crops till payment of the rent. Held, this agreement was merely executory, and gave A no general or qualified property in the crops, till raised and delivered to him.(1)*

13. A had two pipes of wine in a bonded warehouse, in the name of B, who had secured the duties. A sold to C, giving him a delivery order, and C agreeing to pay the duties. B paid them, carried the wine to his cellar, and was repaid by A. C never requested a transfer to his name, but took one pipe, and paid rent to B. Held, B, by request of A, might retain the other for the duties.(2)

14. The lien of the vendor will cease, notwithstanding his actual possession, where he neglects to take the step for obtaining payment, which was provided for in the contract, omits to claim a lien in reasonable time, and delivers a part of the property.

15. A, at Bristol, sold goods to B, to be paid for by B's acceptance of A's draft. The goods were weighed and an invoice furnished, but they were left in possession of A. A neglected to draw a bill. B sold portions of the goods, and gave orders upon A to the purchasers, upon which A delivered them the quantities sold. Afterwards, B sold a specific portion to C in London, receiving payment therefor, and giving C an order upon A to deliver the goods, which C transmitted to A. On the fourth day from A's receiving the order, B became bankrupt. A then first refused to deliver to C, claiming a lien upon

(1) Brainard v. Burton, 5 Verm. 97.

(2) Winks v. Hassall, 9 B. & C. 372.

* Agreement between A, the owner of a saw-mill, and B, that A should have a lien on all boards sawed for B, for the charges of sawing; the boards to be removed a short distance from the mill, but the lien to hold till payment. Held, the lien was as effectual as if A had actual possession. Wheeler v. M'Farland, 10 Wend. 318. See Mount v. Williams, 11 Wend. 77. Sumner v. Hamlet, 12 Pick. 76. A purchased goods of B, which by consent remained in B's store. While there, A borrowed money of C, giving him an order on B for the goods, which were removed to C's store, but afterwards, by A's order, carried back to B's store, where they were attached by B and other creditors of A. C brings an action against the officer, and recovers judgment, the facts showing a lien in his favor upon the goods. Jones v. Baldwin, 12 Pick. 316. As to the *maritime* lien upon a ship, for supplies furnished her, which does not depend at all upon possession, see 7 Cow. 670. 4 Mass. 92. 11. 72. 3 Cranch, 140.

the goods for the price. Held, C might maintain *trover* against A; that A was bound to give immediate notice of his refusal to deliver the goods; and (it seems) that after neglecting to draw a bill, delivering samples to sell by, and answering other orders, there would be no lien, even though he had given immediate notice. After the sale, the warehouse of A became that of B.(1)

16. But where A agreed to sell goods to B, who paid a sum of money to bind the bargain; and the goods were packed in cloths furnished by B, and deposited in a building of A's till B should send for them, A declaring at the same time that they should not be carried away without payment; held, though the property in the goods passed to B, A still retained a lien for the price.(2)

17. So where constructive acts of delivery have taken place, but not the particular act which *usage* has established for transferring a title, the vendor may still retain a lien even against a purchaser from the vendee.*

18. A sold to B a quantity of rum, lying in the warehouse of C at L, and delivered him a marked and numbered invoice. B accepted A's draft for the price, and sold and received payment for the rum from D. There was a usage at L, for the vendor to give the vendee delivery-orders, addressed to the warehouseman, who accepted such orders. But no order was given in the present case by A to B, except for a small portion of the rum, which B received. By permission of B, but without the knowledge of A, D gauged and coopered the casks in the warehouse, and marked them with his initials. B's acceptance of the draft having been dishonored, held, under the circumstances, A had a lien on the rum for the price.(3)

(1) *Green v. Haythorne*, 1 Star. 447.

(2) *Goodall v. Skelton*, 2 H. Bl. 316. (1 Cr. & M. 333. 5 N. & Man: 608.)

(3) *Dixon v. Yates*, 2 Nev. & M. 177.

* Supplies furnished to West India estates have been held to give a lien upon the produce of such estates, by virtue of a *usage* of the parties. *Simond v. Hibbert*, 1 Russ. & My. 719.

19. In Maine it is held, that the usual contract lien upon timber, for the price of *stumpage*, attaches to the proceeds in the hands of a *bona fide* purchaser for valuable consideration, having notice of the lien.(1)

20. Where a vendee assigns the goods, not in the usual course of trade, but by way of indemnity against liabilities incurred for him; the vendor has the same lien against the assignee, which he would have against the vendee himself.(2)

21. The effect of a *part-delivery* upon the vendor's right of lien has been already *incidentally* noticed;* but the books furnish some cases, which have been decided chiefly or exclusively upon this particular point. It seems to be now settled, though formerly somewhat doubtful, that the seller's allowing the purchaser to take away a part of the goods without payment is not an entire waiver of the lien, if there be an intention to retain the rest. But it is otherwise, where delivery of a part of the goods is made in the progress of, or with a view to, the delivery of the whole.(3)†

22. The plaintiff sold to one A a raft of lumber, to be delivered at Albany, and paid for on delivery. A agreed with the defendant to deliver the lumber to him, to be sold on commission. The plaintiff, having brought the raft to Albany, fastened it to the dock of the defendant, and informed the workmen employed there that it had been purchased by A. The men thereupon began to pile the lumber upon the dock. The plaintiff went away, and, upon his return, some hours afterwards, found nearly the whole quantity had been piled. Having learned, while absent, that A had absconded, he forbade the piling of any more, upon this ground. During the piling, the defendant advanced money and goods to A on account of the lumber.

(1) Warren v. Bartlett, Maine, Law Repor. May, 1839, p. 14.

(2) Lupin v. Marie, 6 Wend. 77.

(3) Long on Sales, (Am. Ed.) 264.

* See *Part-Delivery*.

† Part-payment of the price destroys the vendor's lien, only *pro tanto*. Feise v. Wray, 3 E. 93. Hodgson v. Loy, 7 T. R. 440. So where a proportional part of the goods is delivered. Long, 264. The right of lien continues, though a part of the debt be barred by the statute of limitations. Spears v. Hartly, 3 Esp. 81.

The plaintiff, having demanded it from the defendant, brings trover against him. Held, the action might be sustained. As the sale was of *the whole raft*, the plaintiff could not demand payment till the whole was delivered; hence there was no delay in demanding payment, which raised any presumption of a credit. It was sufficient, for the purpose of preserving a lien upon the whole, for the vendor to be at the place of delivery, and demand payment when the whole was delivered.(1)

23. A sold to B his whole stock of goods, being a part at Concord, and a part at Portsmouth. The former portion was delivered, and the latter agreed to be delivered at C, and accordingly sent there by a carrier from P. Before arrival of the goods, B became insolvent, and one of his creditors, before delivery to him, attached them with his consent. Held, the facts did not show a constructive delivery of the whole property, but A retained a lien upon the part attached. The carrier was A's agent, and there was nothing to show that he had authority to deliver to B. Hence the fact that the goods were attached with B's consent, was immaterial. They were in law still in A's possession.(2)*

24. Where a sale is made on credit, the vendor has no lien for the price. But if the goods remain in his possession till the credit expires, he may retain them till payment.(3)

25. Where a vendor takes a promissory note in payment, and negotiates it, and the note is afterwards dishonored in the hands of the indorsee, this does not revive the vendor's lien upon the goods.

26. A gave B a general authority to sell hay for him. B advertised a sale, upon the conditions, that a certain deposit should be paid, three months' credit, with approved security, given for the remainder of the price, and the lots taken away

(1) Palmer v. Hand, 13 John. 434.

(2) Williams v. Moore, 5 N. H. 235.

(3) 2 N. & M. 177. Bailey v. Adams, 14 Wend. 201. See Cutler v. Pope, 1 Shepl. 377.

* This case would seem to fall quite as appropriately under the head of *stoppage in transitu*, as that of *lien*; but the Court appear to have referred it wholly to the latter.

within forty weeks after the sale. B sold to C, taking his promissory note for the price. C requested permission of B to cut a part of the hay, which was granted, and C accordingly did cut and remove a part of it, but B forbade his carrying away any more. B indorsed the note given by C, and procured a discount of it at his banker's, who credited him with the amount, with the proper deduction. The note was dishonored, and B became bankrupt. The banker and C entered into an agreement, that C should sell him the remainder of the hay, receiving payment partly in money, and partly by a restoration of his own note. Within the forty weeks, the banker demanded the hay of A, who refused to deliver it. In an action of trover by the banker against A, held, 1. if A had a lien upon the hay after the sale, though a note was given for the price, the removal of a part of the property did not extinguish such lien, delivery of part not being shown to be by way of delivery of the whole.* But, 2. that A had no such lien, because the note given by C, afterwards discounted, and still outstanding, was a payment. the use that B made of the money received for the note did not vary the principle.(1)†

27. The question sometimes arises, how far a vendor waives his right of lien, by resorting to legal process against the vendee for recovery of the debt.

28. A sold to B a carriage, to be paid for partly in cash, on delivery, and partly by bill at a date specified. B neglecting to

(1) *Bunney v. Poyntz*, 1 Nev. & M. 229. 4 Barn. & Ad. 568. See *Bailey v. Adams*, 14 Wend. 201.

* C asked permission to take only a part of the hay; and herein the case differed from that, where there is a part-delivery, and still neither before nor at the time any intention appears to separate a part from the rest. (As in *Slubey v. Heyward*, 2 H. Bl. 504.)

† It has been held in Vermont, that a lien is lost, though possession be retained, by taking a note, and giving a receipt for it *as payment*. *Hutchins v. Olcott*, 4 Verm. 549. The defendant sold a quantity of cotton in his warehouse to A on a credit of six months, and an undivided portion of the same to B, taking his note at six months. The broker said the cotton might remain in the warehouse, till the room should be wanted for some other purpose. B, becoming insolvent, assigned his property to the plaintiff. The defendant refuses to deliver the cotton, till his note is paid or secured. Held, the plaintiff might recover against him. *Barrett v. Goddard*, 3 Mas. 107.

take the carriage, A recovered against him in an action for goods bargained and sold, and also for cleaning the carriage. The carriage was afterwards taken by a sheriff, on a process against B, with notice of A's lien, and A brings an action against the sheriff for thus taking it. Held, A retained a lien upon the carriage till the judgment in the former action was paid. That action was for *non-performance* of the contract, and the goods still remained in custody of the vendor. If it had been *for goods sold and delivered*, the case might have been different. And, as between A and B, if the latter suffered any thing from the detention of the carriage, after verdict and before payment, perhaps Equity would interfere.(1)*

29. The question of lien sometimes arises between *part-owners* of personal property, standing, with reference to each other, in the relation of vendor and vendee. The following case, while it involves several of the principles heretofore stated, is modified by the circumstance of this peculiar connexion between the parties.

30. A, B and C and others were part-owners of a whale-ship. Their usual course of proceeding with the cargo, on the return of the ship, was as follows. The whale-bone was taken and sold

(1) Houlditch v. Desanges, 2 Stark. 337. But see Legg v. Willard, 17 Pick. 140. See also Lloyd v. Holly, 8 Conn. 491. Jacobs v. Latour, 2 M. & P. 20. 5 Bing. 131.

* A very valuable note upon the subject of lien, and more particularly upon the question by what acts this right is waived, may be found in Mr. Metcalf's Edition of Yelverton, 67 a. The doctrine, often incidentally advanced, that there can be no lien, where the debt due is a matter of *express contract*, is learnedly examined and successfully refuted. It is further stated (p. 67 i.) that a lien is to be considered as waived only, 1. where there is a special agreement, which is inconsistent with it, such as an agreement for credit: or where possession is gained for some other specific purpose. 2. Where the party has not possession, or has voluntarily parted with it. 3. Where he is guilty of laches in enforcing his right. A lien is not waived by the neglect of a party to state that he retains the property on that ground. Nor by his refusing to give up other goods, in connexion with the property in question, on which goods he has no lien. So where A had a lien upon certain goods, and purchased the same from a trader after bankruptcy, and, upon a demand by the assignee, refused to surrender them, this was held to be no waiver of the lien—the lien was not merged in the purchase. White v. Gainer, 2 Bing. 23. Otherwise, where a party claims to retain the goods on another ground than that of lien. Boardman v. Sill, 1 Camp. 410 n.

by B, and the ship's expenses paid from the proceeds. The blubber was deposited in a warehouse hired of C by the ship-owners. The oil was then put in casks, and the share of each owner weighed and put by itself, with his initials on the casks. The warehouseman then delivered to each owner his share of the oil, unless the ship's husband gave notice that such owner had not paid his share of the expenses; in which case his share of the oil was retained till payment was made. On the arrival of the ship in 1825, the above course was adopted. A's share, amounting to twenty-nine tons, was stowed in casks, marked with his initials. C debited A in account with a portion of the warehouse rent. In January 1826, A became bankrupt. Twenty tons of oil had been previously delivered to him, but the rest remained in the warehouse. In the same month, the ship's husband notified the warehouseman not to deliver the remainder, A's share of the expenses remaining unpaid. The assignees of A bring trover for the oil. Held, the other ship-owners had a lien upon A's share, which had not been divested; that, in view of the previous usage of the parties, the appropriation to A of a specific portion of the oil, by putting it in casks, &c., was not absolute, but qualified; that the removal of the twenty tons made no difference as to the right of retaining the remaining nine, because these were considered as sufficient security for A's share of the expenses; that the *debiting* of the rent to him did not impair the lien, because this must have been paid before the oil was taken away, or deducted from A's share of the proceeds of sale, in case the other owners were compelled to sell, for payment of the expenses; and judgment was rendered for the defendants.(1)

(1) *Holderness v. Shackells*, 8 B. & C. 618.

CHAPTER VIII.

STOPPAGE IN TRANSITU.

1. *General doctrine ; the right of stoppage compared with that of lien, and a rescinding of the contract ; history of the law upon the subject ; Courts of law and equity, jurisdiction of.*
5. *How and when it may be exercised.*
7. *By what kind of delivery defeated.*
27. *Paramount to liens against the vendee.*
28. *Continues while any act is to be done by the vendor.*
34. *Knowledge by the vendor of the vendee's insolvency.*
35. *Waiver of the right of stoppage.*
37. *Transitus ends, when the goods arrive at their destination.*
38. *Arrival at a warehouse or other depository.*
44. *Arrival at an intermediate place.*
48. *Possession taken by the vendee before the end of the journey.*
52. *Delivery to a carrier, &c.*
65. *Delivery to wharfingers, &c.*
70. *Stoppage in transitu between principal and agent.*
80. *After a bill of lading, made and indorsed.*
99. *Possession by the vendee of other evidences of title.*
102. *Re-sale by the vendee.*
108. *Part-payment.*
109. *Payment by bills, &c.*
111. *Consignment by debtor to creditor.*
114. *Who may exercise the right.*

1. Nearly connected with the right of *lien*, which was considered in the last chapter, is that of *stoppage in transitu*. The chief points of difference between these two rights are, that the former ceases whenever the property sold passes out of the vendor's hands, that it may be exercised in all cases where the purchaser fails to make payment according to his contract, and that it does not exist where the sale is upon credit; while the latter is designed to restore possession to the vendor after he has parted with it, applies only in cases of insolvency, and is chiefly exercised where the sale is upon credit, because it is for the most part in such sales that the vendor parts with possession without payment. Stoppage in transitu is sometimes called *an extension of the right of lien*.⁽¹⁾ It does not, like the latter, apply, where actual or constructive possession still remains in the shipper or his exclusive agent.⁽²⁾

2. Stoppage *in transitu* is a species of *equitable lien*,* provided to effect the purposes of substantial justice; and not *a rescinding of the contract*. It is the act of *one party*, while a rescinding of the sale is the mutual act of both.† After stoppage *in transitu*, the vendee may recover the goods, by complying with the contract and paying the price. And, on the other hand, the vendor may recover the price in an action for goods bargained and sold, if ready to deliver the goods on payment; the contract providing that payment should precede delivery. So, it is said, stoppage *in transitu* does not render the delivery of goods *conditional*. Though this lien be enforced, the goods strictly belong

(1) See *Parks v. Hall*, 2 Pick. 212. 12 Pick. 313.

(2) *San Jose, &c.* 2 Gall. 268.

* *Ld. Ellenborough* calls it "a sort of *jus postliminii*." *Coxe v. Harden*, 4 E. 218. It is said to have grown out of the hardship, in particular cases, of the rule, that goods consigned to a bankrupt, which arrive after the act of bankruptcy, are considered as part of the bankrupt's effects. *Scott v. Pettit*, 3 B. & P. 472, 3. The first case recognizing the right, was *Snee v. Prescott*, 1 Atk. 245, in which *Ld. Hardwicke* said, that the vendor may regain possession by any means short of absolute violence. "By any means *not criminal*," is the expression of another eminent judge. *Holt*, 20 n. It is said never yet to have been decided, that bankruptcy is of itself a countermand of goods purchased. Per *Ld. Kenyon*, *Ellis v. Hunt*, 3 T. R. 467.

† This, however, is not always the case. A sale may sometimes be rescinded *ex parte*. (See *Rescinding of Sales*, Ch. 10.)

to the vendee; and, if they are of more value than the lien, though this be for the whole price, the balance belongs to the vendee. It would be absurd to say, that the vendor has a lien upon his own goods. On the above grounds, where a vendor is prevented by false pretences from exercising the right of stoppage *in transitu*, this will not sustain an indictment for *obtaining* the goods by false pretences.(1)

3. It was said by Park, J., (in 1828), the right to stop *in transitu* has not been long known to the common law, perhaps not above seventy years,* having been at that time transplanted from the Courts of Equity. Yet it has since been established by such a variety of decisions, that it is now regarded with favor by the common law courts, as a right which they are always disposed to assist; not proceeding at all on the ground of the contract being rescinded by the insolvency or bankruptcy of the consignee, but as an equitable right, adopted for the purposes of substantial justice. It is a right conferred on meritorious persons, and imposes no hardship on any one.(2)

4. It seems, Equity has now no jurisdiction in relation to this right;† and it certainly will not enforce the right, where there has been a complete delivery, notwithstanding gross fraud in obtaining the goods.(3)

5. The right of stoppage *in transitu*, being an equitable authority to re-possess the goods sold, upon the insolvency of the vendee, cannot be exercised in mere caprice. There must be

(1) *Hodgson v. Loy*, 7 T. R. 445. *Holt*, 20 n. *Jordan v. James*, 5 Ohio, 98. *Stanton v. Eager*, 16 Pick. 474. *Kymer v. Suwercropp*, 1 Camp. 109. *Rowley v. Bigelow*, 12 Pick. 313. *People v. Haynes*, 14 Wend. 565,†6. *Buckley v. Furniss*, 15 Wend. 142, 3.

(2) *Tucker v. Humphrey*, 4 Bing. 519. Per *Ld. Kenyon*, *Northey v. Field*, 2 Esp. 614, 15. 12 Pick. 313. *Bartram v. Farebrother*, 4 Bing. 585.

(3) *Goodhart v. Lowe*, 2 J. & W. 349. *Conyers v. Ennis*, 2 Mas. 236.

* Long (on Sales, p. 307) says the practice was unknown to the law as lately as the year 1690.

† Equity will not grant an injunction against the sale of a ship, on the application of one who has sold goods on board such ship, where he still retains the right of stoppage *in transitu*. *Goodhart v. Lowe*, 2 Jac. & W. 349.

a positive exertion of the right. And it should be stated as done *co intuitu*, and adversely.(1)*

6. It seems, the right of stoppage *in transitu* is not affected by lapse of time after the sale.(2)

7. A vendor may part with his property and dominion by a symbolical and constructive delivery, as well as a corporal touch. But he has the right of stoppage *in transitu* for any part of the price, before actual delivery.(3)

8. In some of the earlier cases, particularly that of *Hunter v. Peale*, (3 T. R. 466 n.) *Ld. Mansfield*, who carried the doctrine of stoppage *in transitu* a great way, seemed to expect that, in order to put an end to this right, the goods must come to the actual corporal touch of the vendee.† But, in a subsequent case,(4) *Ld. Ellenborough* says, the question is, whether the party to whose touch the property actually comes, be an agent, so far representing the principal, as to make the delivery to him a full and final delivery to the principal, and not a delivery

(1) *Per Walworth. Chancellor, People v. Haynes*, 14 Wend. 563. *Per Ld. Ellenborough*, 6 E. 380.

(2) *Buckley v. Furniss*, 15 Wend. 137.

(3) *Jordan v. James*, 5 Ohio, 98.

(4) *Dixon v. Baldwin*, 5 E. 175.

* But the right of stoppage *in transitu*, though *adverse* to that of the consignee, is not defeated by a communication from him to the vendor, revoking the order, declining to receive the goods, and requiring the master or any one having charge of them to deliver them to the vendor. *Naylor v. Dennie*, 8 Pick. 198.

† On the other hand, formerly, *actual, corporal touch by the vendor* was held requisite to a stoppage *in transitu*. But the modern doctrine is, that, after notice to the carrier of goods not to deliver them, he is liable in *trover* if he does deliver them. Such notice may re-vest in the vendor the property which was before in the vendee. Before notice, the vendee may maintain *trover* against the carrier; after notice, the vendor. A claim for, and attempt to stop the goods, is all that the law requires. *Litt v. Cowley*, 7 Taun. 169, 170. 2 B. & P. 462. *Newhall v. Vargas*, 1 Shepl. 93. Where the captain of a ship receipts for goods, he should not sign a bill of lading, till the receipt is given up. If the receipt is in the hands of the vendor, who after the failure of the vendee demands the goods, and the captain refuses to give them up, on the ground that he has signed a bill of lading to the vendee, this is a conversion, though the vendor did not tender the freight nor pay for the trouble of loading. So, though one of the vendors said to one of the vendees, after the failure, that he was sorry for it, but would do as other creditors did; if this conversation was unknown to the captain. But if the captain had said—"the goods are now on board, and I must take them to their destination," this would be no conversion. *Thompson v. Trail*, 2 C. & P. 334.

merely to a person acting as a carrier or mean of conveyance.(1)

9. Ld. Kenyon remarks—"I once said that a *corporal touch* was necessary to constitute complete delivery. I wish the expression had not been used. It says too much." Any act of ownership is all that is necessary; such as payment for a warehouse. Upon the same principle, where the purchaser of wine lived in Norwich, and the wine was sent from London to Yarmouth, and there received by the vendee's agent, and the vendee went there, tasted and took a sample of the wine; held, under these circumstances the vendor might sue for the price, and his right of stopping was at an end. So a delivery to a commission merchant, by placing the goods to the vendee's account, is sufficient. But not a mere claim of the goods by the vendee (2)

10. Where a vendee is on the spot personally to select the goods, and has them laid aside, boxed and directed; it seems, the vendor can have no right to stop them on their way to his place of residence.(3)

11. Where goods are delivered to the purchaser at a wharf, and he ships them there, the *transitus* is at an end, and they cannot be stopped.(4)

12. The delivery by a carrier of a part of goods sent by vendor to vendee, is *prima facie* a delivery of the whole, and puts an end to the right of stoppage in transitu.(5)

13. But the vendor of goods has a general lien for the price while they remain in his possession, though there have been a part-delivery, if the right of stoppage *in transitu* is not lost.(6)

14. So where goods remain in the warehouse of the vendor, rent-free, and he gives the vendee a delivery-order upon which a portion of the goods have been taken; the vendor still retains the right of stoppage *in transitu*.(7)

(1) Rowe v. Pickford, 1 Moore, 528.

(2) Wright v. Lawes, 4 Esp. 85. Ib. 82.

(3) Per Tracey, Sen.; People v. Haynes, 14 Wend. 565.

(4) Noble v. Adams, 7 Taun. 59.

(5) Betts v. Gibbins, 4 Nev. & M. 64. 2 Ad. & El. 57.

(6) Hanson v. Meyer, 8 E. 614. 2 Smith, 670.

(7) Townley v. Crump, 5 Nev. & M. 606.

15. Goods may be stopped *in transitu*, though carried in a ship named by the vendee.(1)*

16. Goods were sold on credit at a foreign port, and shipped in a vessel of the vendee, consigned to him, to be delivered at his port of residence. The vendee having become insolvent, before payment, and before obtaining actual possession; held, the vendor might exercise the right of stoppage *in transitu*. Nor does it make any difference, that the vendor bought the goods on credit for the vendee, and took bills drawn by the master of the vessel upon the vendee; or that he charged a commission, or received part payment.(2)

17. But where goods are sold, to be paid for on delivery, and are put on board a ship appointed by the vendee, not for the purpose of being carried to him or delivered for his use and at a place of his appointment, but to be shipped by the vessel in his name and from his place of abode and business to a third person; the vendor has no right of stoppage after the goods are embarked.(3)

18. A, in England, chartered a vessel for a voyage to Russia, to bring goods purchased from B; the captain contracting to go to Russia and bring home a cargo, and A agreeing that it should be equal to the tonnage of the ship. B shipped the goods on account and at the risk of A, and sent him invoices and bills of lading. A having become bankrupt, the agent of B demanded the goods of the captain before unlading, but he delivered them to the assignees of A. B brings *trover* against the assignees. Held, there was the same right of stopping the goods on board the ship before actual delivery, as if they had been sent

(1) Thompson v. Trail, 2 Car. & P. 334.]

(2) Newhall v. Vargas, 1 Shepl. 93.

(3) Rowley v. Bigelow, 12 Pick. 307.

* *A fortiori*, where they are shipped at the risk of the shipper. This point incidentally arose in an admiralty case, as follows. A, an American citizen, made claim to certain goods captured in the ship *Frances*. The goods were shipped by a British house, consigned to A, but at the risk of the shippers; and captured by an American privateer. A resisted the title of the privateer, on the ground that the property vested in him upon delivery to the master, he having made advances upon it. Held, A's claim was not valid. The *Frances*, 8 Cranch, 418. 9. 183.

in a general ship; and that the rights of the parties were the same, as if B had made a similar contract in Russia for forwarding the goods, by A's directions; in which case these facts would not have constituted a delivery. It was remarked by the Court, that where the goods in question make up only one half the freight, the right of stoppage under such circumstances is unquestionable; and the fact that they constitute the whole freight does not vary the principle.(1)

19. But in another case, A hired a ship for three years, at so much a month, he finding stock and provisions and paying the master, and having the whole control and disposal of the vessel. The ship had been one voyage to Alexandria, and the goods were put on board for another voyage to the place—not to be conveyed from B, the vendor, to A, but that they might be sent by A upon an adventure, for which he had bought them. Held, there was a delivery, and the right of stoppage was at an end.(2)

20. A, residing at London, in the prospect of insolvency, procured goods from B at Glasgow, and paid for them by a bill drawn upon a London house which he knew to be insolvent. The goods were shipped at Leith, (the invoice and receipt from the ship-owners being made out to A) and were delivered to C, a wharfinger in London, who afterwards received notice to hold them for B. A, having become bankrupt, brought *trover* against C for the benefit of his assignees. Held, the receipt, made out to A, was a delivery of the goods to him, and terminated B's right of stopping *in transitu*; and that the evidence of fraud on the part of A was not strong enough to avoid the contract.(3)

21. A, the general agent, in London, of B and Co. of Paris, with power to export for them to such markets as he should think fit, purchased goods in the name of B and Co., from C at Manchester, and directed them to be sent to D, a packer, at London. The goods having arrived, A had some of them unpacked and sent away, and the rest re-packed. Upon the failure

(1) *Boghtlingk v. Inglis*, 3 E. 381.

(2) *Fowler v. Rymer*, cited 3 E. 396.

(3) *Noble v. Adams*, 2 Marsh. 366. 7 Taun. 59.

of B and Co., held C could not stop the goods in D's hands, the *transitus* being at an end.(1)

22. A, the plaintiff, consigned goods to B, at London, which were left at an inn in that city. Upon B's bankruptcy, his assignee, one of the defendants, went to the inn and put his mark upon the goods, but did not remove them, they having been previously attached in a suit against B. Upon hearing of B's bankruptcy, A countermanded the goods. Held, A could not maintain trover, the *transitus* being at an end, when the mark was put upon the property; and the marking by the defendant having the same effect as if done by B himself.(2)

23. The following general principles have been laid down, as to the effect of *constructive* delivery upon the right of stoppage *in transitu*.

24. *Actual* delivery puts an end to the right of stoppage *in transitu*. *Constructive* delivery is a delivery for certain purposes only. Being a *fiction*, it is so construed as to work equity; and is held so far a delivery as to make the carrier responsible to the vendee, but not to terminate the *transitus* of the goods in case of bankruptcy.(3)

25. The general rule is not (it seems) that goods may be stopped after a merely constructive delivery, and that nothing but actual delivery vests a title indefeasibly in the vendee; but that the *transitus* ends by delivery, actual or constructive, and the exception is only where a constructive delivery is made for the purpose of transport.(4)

26. In the case of *Stubbs v. Lund*,(5) Parsons, Ch. J., puts the right of stoppage *in transitu* upon the ground of the destination of the goods, or final termination of the voyage. But in *Bolin v. Huffnagle*,(6) Rogers, J., calls this "a subtle distinction."

27. It seems, the right of stoppage *in transitu* is paramount to any lien against the vendee. Thus it may be exercised to

(1) *Leeds v. Wright*, 3 Bos. & P. 320.

(2) *Ellis v. Hunt*, 3 T. R. 464.

(3) *Oppenheim v. Russell*, 3 B. & P. 50.

(4) *Bolin v. Huffnagle*, 1 Rawle, 19. *Brown on Sales*, 506.

(5) 7 Mass. 453.

(6) 1 Rawle, 9.

defeat an attachment or execution served upon the goods by a creditor of the vendee. An attachment operates only upon the interest of the debtor, but does not defeat the paramount right of a stranger. If it did, the right of stoppage *in transitu* would be of little practical value, because an attachment of his property is often the first notice of a vendee's insolvency. The vendor's power of intercepting the goods is the elder and preferable lien, and not superseded by the attachment, any more than it would have been by the general right of a common carrier to retain all his customer's goods for his general balance.(1)

28. Where goods are not deliverable without a further act of the vendor, the right of stoppage continues. Thus, where the property sold is part of an entire mass—as, for instance, part of the liquid in a vessel;—the right of stoppage continues, it seems, till a separation of the quantity sold. So where the goods remain to be sorted, numbered and weighed, the right continues, notwithstanding a delivery of part of them.(2)

29. The plaintiff went to the defendant's shop to purchase articles of plate. The price was agreed upon, but the goods were not to be delivered then, but were to remain to be engraved at the defendant's expense. They were accordingly delivered to an engraver, who was directed by both parties to return them to the defendant. The price was paid, at the time of the agreement, in notes of A, a banker, whose house at that time was closed, and in consequence of A's bankruptcy was never reopened. The notes were not paid. The plaintiff brings trover for the goods. Held, while the goods remained to be engraved at the defendant's expense, they were only *in transitu*, and there was no complete delivery to the plaintiff; and that as the defendant had not agreed to take the notes as payment, and run the risk of their being paid, upon a failure of consideration, the plaintiff ceased to have a claim to the goods, and this action would not lie. Under the circumstances, it seems, the defend-

(1) *Morley v. Hay*, 3 M. & R. 396. *Buckley v. Furniss*, 15 Wend. 137. *Smith v. Goss*, 1 Camp. 282. *Naylor v. Denuie*, 8 Pick. 198.

(2) *Austen v. Cranem*, 4 Taun. 464. 13 E. 525. *Hanson v. Meyer*, 6 E. 614. 11. 210.

ant could not have recovered for goods *sold and delivered*, though perhaps he might as for goods *bargained and sold*. (1)

30. Sale of ten tons of flax, at so much per ton, out of a larger quantity, packed in mats of uncertain weight. The price was to be paid by an acceptance at three months. A note was given for delivery on a certain day, after which the rent of the building where the flax lay was charged to the vendee. The order for delivery was entered in the wharfinger's books. Allowance for tare and draft was to be made by the weight. Held, the vendor might rescind the sale upon bankruptcy of the vendee, and maintain *trover* against the warehouseman. The weighing was to be the act of the vendor as well as the vendee. The former must pay for and superintend it, and it could not be done without giving him notice. He also had the right to make a selection. The mats being of unequal quantities, the fraction of one might be requisite to make up the weight sold. (2)

31. A sale-note for fifty tons of oil was delivered by the broker of the vendor to the vendee, payable by a future acceptance. The vendee also received an order upon the wharfinger to deliver fifty tons out of a quantity of ninety. A usage was shown in case of the sale of oil, to have the cooper of the vendor search the cask, and the mutual broker of the parties ascertain the quantity of soot, dirt and water in each, for which allowance was made. The casks were then to be filled by the vendor's cooper at his expense. All this took place before delivery. Held, that in the present case, the sale was not complete, but on the vendee's becoming bankrupt, the vendor might countermand it. (3)

32. But where the vendee re-sells the property, before separation of the particular part sold by the vendor, the former has not the right of stoppage *in transitu*, upon the bankruptcy of the second purchaser.

33. A, having forty tons of oil in the same cistern, sold ten

(1) *Owenson v. Morse*, 7 T. R. 64.

(2) *Busk v. Davis*, 2 M. & S. 397. 5 Taun. 622. n.

(3) *Wallace v. Breeds*, 13 E. 522.

tons to B, and received payment. B sold to C, taking his acceptance at four months, and giving him an order for delivery upon A, who accepted it in writing. The ten tons were never delivered, but still continued mixed with the rest in the cistern. Before his acceptance became due, C became bankrupt. Held, there was a complete delivery in law by B to C, B never having himself had actual possession, and nothing remaining to be done between him and C, though, as between A and C, the oil was yet to be measured. A was the common bailee of both the other parties. Hence B could not countermand the sale, nor stop the property as *in transitu*.(1)

34. It seems, there can be no stoppage *in transitu*, where the vendor knew that the vendee was insolvent at the time of sale. But where the sale took place in 1833, the vendee had failed in New York in 1829, the vendor knew this fact, but not that he had remained insolvent ever since; and the vendee afterwards transacted business in the country, and represented that he was largely interested in real estate; and the vendor had previously sold him goods and been promptly paid, and was ignorant of his being much in debt, and of his securities having been protested; held, no sufficient notice of insolvency to prevent the exercise of the right of stoppage.(2)

35. Nor can the vendor exercise the right of *stoppage in transitu*, where, by some act subsequent to the original contract, he seems to have waived such right.

36. A sold to B a butt of wine, but did not deliver it. B afterwards made a composition with his creditors, and the price of the wine was by A's consent included in such composition, A having also another claim against B. Before payment of the whole composition, B demanded the wine, and, upon A's refusal to deliver it, brought *trover* against him. Held, A's undertaking bound him to deliver the wine, and the doctrine of stoppage *in transitu* did not apply. It was a sufficient consideration for A's promise, that he thereby obtained security for his whole

(1) *Whitehouse v. Frost*, 12 E. 614.

(2) *Buckley v. Furniss*, 15 Wend. 137.

debt. The right of stoppage, instead of being insisted on, was given up.(1)

37. It is the general rule, that where goods are sold to be sent to a particular destination named by the vendee, the right of the vendor to stop them continues until they arrive at that place of destination.(2)

38. If a man be in the habit of using the warehouse of a wharfinger as his own, and make that the depository of his goods, and dispose of them there, the *transitus* will be at an end when the goods arrive at such warehouse.(3)

39. Goods may be stopped *in transitu*, if deposited at the king's warehouse for duties, though they have been claimed by the vendee.(4)

40. Trover by assignees for certain goods sent to A, a bankrupt, in London, from Manchester. The goods arrived in the office of the defendants, who were carriers, before A's bankruptcy, and remained there till they were removed by A's agent, to be shipped for the Continent, according to A's general practice in relation to goods thus consigned. A had no warehouse of his own. Held, the *transitus* was at an end on the arrival of the goods at the wagon-office, and that the plaintiffs were entitled to them notwithstanding a claim by the sellers to stop them.(5)

41. A shipped goods from Newcastle for London, to the order of B. Finding that B was insolvent, A applied at the defendant's wharf in London, where the goods had in the mean time arrived, and where goods shipped for B were usually landed and kept till sent for by him, tendering the freight and charges paid for the goods, and requiring delivery of them, which was refused, unless upon payment of a general balance due from B to the defendant for wharfage. Held, it seems, that the *transitus* was at an end upon the arrival of the goods at the

(1) *Nichols v. Hart*, 5 C. & P. 179.

(2) Per Bayley, J., *Coales v. Railton*, 6 B. & C. 425. *Stanton v. Eager*, 16 Pick. 474.

(3) *Tucker v. Humphrey*, 4 Bing. 521. (3 Bos. & P. 127. 1b. 469. 6 B. & C. 109.)

(4) 2 Esp. 603.

(5) *Rowe v. Pickford*, 1 Moore, 526.

defendant's warehouse, this being the usual place, where B's goods were deposited and disposed of.(1)

42. A purchased for B, with his (A's) own money, a quantity of flour at S, which was sent to London by water, reached the wharf April 12, and was landed April 22d. The invoice was forwarded to B, and a *manifest* of the flour to a wharfinger in London, who was in the habit of delivering goods to the consignee when called for, and in the mean time keeping them in his vessel. If not called for, his practice was, upon the return of the vessel, to store them in his warehouse, to the order of the consignor. If the goods were to be delivered to order, he delivered them either upon a bill of lading or an invoice from the shipper. B was in the habit of having flour consigned to him at the wharf, and of selling it either on board or as it lay in the wharfinger's warehouse. B having become bankrupt; on April 17, before any application by him, A by an order claimed the flour. Held, he was entitled to stop it as *in transitu*.(2)

43. March 16, goods were sent, upon a previous order, from Manchester, directed to A, at the B. & M. inn, London. A having left no directions as to the goods at this inn, March 23, they were sent to the house of B, the defendant, as the packer of A, to whom A had given a general order that all his goods should be sent, A having no warehouse of his own. March 11, A committed an act of bankruptcy. Upon their arrival, the goods were booked to A's account, and were unpacked by B, who was ignorant of the bankruptcy. March 31, the consignors, and on the next day the assignees of A, the plaintiffs, claimed the goods. Held, there being no other place of delivery in this case than B's warehouse, the goods, when arrived there, had come to their last destination, and consequently were no longer liable to the right of stoppage *in transitu*; and that the plaintiffs should recover the value of them in *trover*.(3)

44. The question often arises, whether the arrival of goods purchased at an intermediate place, between the two points of

(1) *Richardson v. Goss*, 3 B. & P. 119.

(2) *Tucker v. Humphrey*, 4 Bing. 516.

(3) *Scott v. Pettit*, 3 Bos. & P. 469. (See also *Leeds v. Wright*, lb. 320.)

departure and of destination, puts an end to the right of *stoppage in transitu*.

45. A, residing at Guernsey, employed B as his agent at Southampton, to ship all goods which should arrive at the latter place, directed to A. B paid the carriage and wharfage, and selected the ship by which certain goods, purchased of C, were forwarded. A having become insolvent, both A and C were desirous that the goods should be stopped; but B claimed to retain them by virtue of a lien for a debt due from A. The jury found that the re-loading after the goods were shipped for Guernsey was for the use of the owner. Held, the *transitus* was not terminated at Southampton, but continued after the embarking for Guernsey; and that B could not retain the goods.(1)

46. A ordered a quantity of goods from B, who lived at a distance from him, to be forwarded to an intermediate place. The goods were accordingly sent, and, upon arriving at such place, were delivered to a carrier employed by A, and a part of them received at his residence. Before the remainder reached A's residence, B resumed possession of them on the ground of A's insolvency. Held, the *transitus* was not ended, because, although the whole quantity was ordered and forwarded at once, yet it became separated on the journey, and delivery of part did not pass an absolute title to the rest.(2)

47. A, living in London, on March 31st sent orders to B, a manufacturer at Manchester, for certain goods, "to be sent to C at Hull, to be shipped for Hamburg as usual," which accordingly came to C's possession. A was in the habit of ordering goods from B, to be sent to C at Hull, and thence forwarded to A's correspondent at Hamburg. A became insolvent in July, and on Sept. 26th committed an act of bankruptcy. Held, as the goods, upon reaching Hull, had so far gotten to the end of their journey, that they waited for new orders from the purchaser to put them again in motion, and communicate to them another substantive destination, without which orders they would con-

(1) *Nicholls v. Le Feuvre*, 2 Bing. N. R. 81.

(2) *Buckley v. Furniss*, 17 Wend. 504. 15. 137.

tinue stationary ; as between buyer and seller the right of stopping *in transitu* was at an end, but that A might agree *bonâ fide* and not in the way of voluntary and undue preference to give up the goods to C in the latter part of July ; and that as evidence of the fairness of the transaction, the facts of A's having called a meeting of his creditors, taken legal advice, and been thereby encouraged to give up the goods, were proper for the jury, though they were shortly followed by bankruptcy—B at the time they were given up having possession of them as still *in transitu*.(1)

48. The question of stoppage often arises, where possession is taken by the vendee before the place of destination is reached.

49. Where a man orders goods to be delivered at a particular place, it has been held, that the *transitus* continues until they are delivered to the consignee at that place, or till *the journey's end* ; but that must be understood of a delivery in the ordinary course of business ; for if the consignee, before the goods reach their ultimate destination, postpones the delivery, or is allowed to do any act of ownership, or any thing which is equivalent to taking actual possession of them, the *transitus* is at an end. Thus, if the vendee meet the goods on the road, and take possession of them, this is constructively the end of the journey, and the right is at an end.(2)

50. But other cases hold, that although the vendee has come into possession of the goods, if the proposed voyage is not completed, the vendor has still the right of stoppage *in transitu*.(3)

51. Before arrival of the ship, containing goods purchased, at the port of destination, the vendee became insolvent ; and as soon as they arrived, his assignees took possession of them. The ship was afterwards ordered out on quarantine. Held, during quarantine, the vendor might stop the goods as *in transitu*. A consignee cannot claim the goods by virtue of his *possession*, unless such possession were obtained *on completion of the voyage*. He cannot be allowed to go out to sea, to meet the

(1) Dixon v. Baldwin, 5 E. 175.

(2) Per Bayley, J., Foster v. Frampton, 6 B. & C. 108. 15 Wend. 137. Per Ld. Alvanley, 2 B. & P. 461. Jordan v. James, 5 Ohio, 98.

(3) 1 Esp. 242.

ship; for upon the same principle he might meet her when leaving her port of departure.(1)*

52. The same question often arises, where the goods have been put into the hands of a *carrier*. Upon this point, the law has been stated as follows.

53. Actual delivery into the possession of a consignee or vendee vests in him the absolute property. So also, delivery to a servant or correspondent authorized to receive the goods, which is equivalent to a delivery to the vendee himself. The question is in all cases, whether the receiver is an agent, so that delivery to him is a full, effectual and final delivery to the principal, as distinguished from delivery to one who is virtually a carrier or mean of conveyance to or on account of the principal, in the mere course of *transit*, in which case the right of stoppage continues till actual possession by the vendee or the end of the journey.(2)

54. The question, whether the vendor having got possession of the goods can keep them, is very different from that, whether he can recover them from the middle man. It seems, an action does not in all cases lie against a carrier who after notice delivers to the vendee; more especially where the goods are sent by water, and the master signs a bill of lading to deliver to the vendee. But it is otherwise where notice not to deliver is given by the vendor to a wharfinger, and no demand made by the vendee, and the wharfinger admits himself a stakeholder.(3,†

(1) *Holst v. Pownal*, 1 Esp. 240.

(2) *Bolin v. Huffnagle*, 1 Rawle, 9. *Buckley v. Furniss*, 13 Wend. 137

(3) *Mills v. Ball*, 2 B. & P. 461, 2.

* It has been suggested, that in relation to the point above considered, there is a distinction between carriage by sea and carriage by land. In the former case, the master, by signing the bill of lading, agrees with the consignor to deliver the goods *at the destined port*; but in the latter there is no such agreement. Consequently, in the former case, the consignee cannot demand them before arrival at the port named. The soundness of this distinction, however, has been lately questioned. 2 Bos. & P. 461 n. *Abbott on Ship*. 374. 2 M. & W. 633.

† The doctrine of stopping goods *in transitu* is bottomed on the case of *Snee v. Prescott*.(a) On this all the other cases are founded.(b) In that case Lord Hard-

(a) 1 Atk. 248.

(b) *Ellis v. Hunt*, 3 T. R. 467.

55. The original delivery of goods to a carrier vests the property in the vendee, but it is liable to be defeated by his subsequent insolvency.(1)

56. It never has been held, that goods while in the hands of a carrier or wharfinger are to be considered as finally delivered, unless such party is actually the agent of the vendee. And those cases have all turned on attempts to defeat a general body of creditors.(2)

57. The purchaser of certain hogsheads of sugar, being notified by the carrier of their arrival, took samples from them, and for his own convenience as he was in the habit of doing, desired the carrier to keep them in his warehouse till further orders. While they remained there, he became bankrupt. Held, they were no longer *in transitu*, and the vendor could not hold them against the assignees of the purchaser; that from the time of his taking samples and agreeing with the carrier to keep the goods, the latter became his warehouseman, he ceased to be a carrier, and became a mere bailee; and the goods were as much in the purchaser's possession, as if they had been in his own warehouse.(3)

58. The vendor of goods abroad informs the vendee that he has chartered a ship on his account, and forwards to him an invoice, expressing that the goods are for the vendee's account and risk, together with a bill of lading, which states that delivery is to be made to order, &c. "he paying freight for said goods, according to the charter-party." He also informs the vendee, that he has drawn bills upon him at three months for the value of the cargo. The goods were delivered to the captain of the ship, and the vendor's agent obtained possession of

(1) Mills v. Ball, 2 B. & P. 463.

(2) Bartram v. Farebrother, 4 Bing. 585.

(3) Foster v. Frampton, 6 B. & C. 107.

wicke said, that if goods were delivered to a carrier to be conveyed to A, and while the carrier was upon the road, and before actual delivery to A by the carrier, the consignor hears that A his consignee is likely to become a bankrupt, or is actually one, and countermands the delivery, and gets them back into his own possession again; trover will not lie by the assignees of A; because the goods, while they were *in transitu* might be so countermanded.

them under another bill of lading, and refused to surrender them without immediate payment. This the vendee refused, but offered acceptances at three months. Held, the property had vested in the vendee, subject to a condition subsequent and to the right of stoppage *in transitu*; and that as the agent obtained the goods wrongfully, the vendee might have *trover* against him, without tendering freight to him or the captain. Particular stress was laid on the terms of the invoice, "at the account and risk" of the vendee.(1)

59. A, residing at Lisle, applied to the plaintiff, a ribbon-weaver, for ribbons. The defendant having recommended A, the plaintiff delivered the defendant goods, to be forwarded to Lisle. These goods, with others bought of C, were sent, May 12, to D, the defendant's correspondent at Ostend, with directions to send them to the order of A. Upon receipt of the goods, May 29, D wrote to A an acknowledgment thereof, stating that the goods awaited his directions. June 12, A stopped payment. August 13, A consented to C's taking back his goods. But not having fulfilled some engagement with the defendant, and being largely indebted to him, the defendant countermanded the order to D, as to delivery, by letter of May 31, and directed an alteration of marks, and a delivery to his order, which was accordingly made, and the goods disposed of to satisfy the defendant's debt. Held, the defendant, after regaining possession of the goods, stood, in relation to them, as he did originally; that they were in his hands *to be conveyed* and were consequently liable to stoppage.(2)

60. Goods, forwarded by the vendor by a water-carrier, were deposited in the warehouse of the latter for the accommodation of the vendee, to be delivered as he should want them. Held, the *transitus* was at an end, though the carrier claimed a lien on the goods. They had reached their destination, until some new order was given respecting them. The office of carrier had been changed for that of warehouseman; and for the purpose of stowing these goods, the warehouse was the vendee's.(3)

(1) Walley v. Montgomery, 3 E. 555.

(2) Stokes v. La Riviere, 3 E. 397.

(3) Allan v. Gripper, 2 Crompt. & Jer. 215

61. A part of certain goods sold were landed by the carrier upon the wharf of the vendee. The latter having become bankrupt, the carrier re-loaded the goods, and carried the whole to his own premises. The goods were sent in different barges, and a part unloaded from each. The vendee took no possession of this portion, nor was it weighed, so that the freight could be ascertained. Held, the property must be considered as *in course of delivery*, not actually delivered; that to put an end to the right of stoppage *in transitu*, there must have been such a delivery as to extinguish the carrier's lien upon the whole property, which was not the case here; that the carrier had a special property till the whole freight was paid or tendered, or till by some act he assented to a delivery without such payment or tender, and that the vendor might recover of the carrier in trover. It was remarked by the Court, that the defendant attempted, as against the assignees of the vendee, to deny that there was a delivery, so as to retain his own lien; and as against the vendor, to set up a delivery, so as to extinguish his right of stoppage.(1)

62. A ordered goods from B abroad. B shipped the goods on account and at the risk of A, and took from the captain bills of lading, making the goods deliverable to his (B's) own order. One of the bills, he sent, unindorsed, with an invoice to A, advising him at the same time that he had drawn for the amount, and doubted not the bill would be honored, and close the account between them. The other bill of lading was sent, indorsed, to C, B's agent. The captain delivered the goods to A, who transferred them to D, on account of a prior debt, and delivered him the bill of lading unindorsed. C brings trover against D for the goods. Held, upon shipment, the property vested in A, subject to the right of stopping *in transitu*; and the delivery by the captain to A vested it in him absolutely, though the captain might be liable to B. A might have insured the goods; or, if uninsured and lost, the loss must fall upon him. Indorsement of the bill of lading to C, it seems, was made only to enable him to take possession of the goods in case of A's bankruptcy, not to transfer the property. Or even if this last

(1) *Crawshay v. Eades*, 1 Barn. & C. 181.

was the object, still the delivery to A gave him a paramount title.(1) (See S. 80.)

63. The right of stoppage *in transitu* cannot be impaired by proof of an account due from the consignee to the carrier; of a usage for the carrier to retain goods for a general balance due him; and of public notice, and special notice to the consignee, of such usage. Even an agreement with the consignee in favor of such a lien would make no difference as to the consignor. An assignee of the consignee must hold subject to the right of stoppage; and, like such assignee, the carrier claims *under* the consignee. It is true, that if in consequence of any thing happening to the goods at their place of deposit, a third person acquires a right to them before the property vests in the vendee, the vendor cannot stop them without satisfying such right. But he is not bound to satisfy rights acquired under the vendee, if he interpose his claim before the goods are in a situation, which gives the vendee a complete dominion. Whether legal process in favor of a creditor of the consignee would prevail over the right of stopping in transitu, may be somewhat doubtful. It may be doubted whether this right could be controlled even by an express agreement with the consignor for a general lien; such lien being against the policy of the law. The case is very different from that of the indorsement of a bill of lading, whereby the right of stoppage is divested; for in this case the vendor by his own act enables the vendee to gain a credit upon the goods. Stoppage *in transitu* is a common law right. If not, the action of *trover* could not be founded upon it. The right arises from the ancient power and dominion of the consignor over his property, reserved at the time of delivery to the carrier. There is a privity of contract between the consignor and the carrier. This appears from the consideration, that if the consignee cannot be found, or refuses to take the goods, the carrier may demand payment from the consignor. Upon these grounds, the consignor's ancient power is paramount to any agreement between the carrier and consignee. The carrier must suffer for his own *laches* in giving credit to his employer.(2)

(1) *Coxe v. Harden*, 4 E. 211.

(2) *Oppenheim v. Russell*, 3 B. & P. 42.

64. If a man living abroad or at a distance, order goods to be sent to A, his packer, in order that A may hand them on to him; A is a mere *middle man* with respect to the right of stopping *in transitu*.(1)

65. Substantially the same principles have been adopted, where goods remain in the hands of a *wharfinger*, or other depository, which have been stated as applicable to *carriers*.

66. A purchases goods from B, to be sent to C a wharfinger, and by him forwarded to A. Held, the goods were *in transitu*, and liable to be stopped, while in the hands of C.(2)

67. Where a wharfinger at Exeter paid the freight and charges up to that place, but was not authorized to meddle with the goods, being only one of the hands, by which they were to be forwarded to North Taunton, their ultimate destination; held, the wharfinger was merely a middle man, and delivery to him did not end the right of stoppage *in transitu* in case of bankruptcy.(3)

68. A ship having arrived from abroad, twenty days from arrival were allowed by law for payment of the duties, after which time the goods were removed from the ship to the king's cellars, and, at the end of three months, sold, and the surplus proceeds paid to the owner. Held, in case of the consignee's insolvency, the agent of the consignor having demanded the goods the day before the three months expired, and they being afterwards sold for the duties; the surplus proceeds were rightfully paid over to the agent, and that the assignees of the vendee could not maintain *assumpsit* against him. Till payment of duties, the goods were *quasi in custodia legis*, and remained subject to the right of stoppage *in transitu*.(4)

69. A sold to B a quantity of tallow, upon a wharf, at so much per hundred weight; and on the same day gave him an order upon the wharfinger to weigh, deliver, transfer and re-house the quantity sold. The wharfinger gave B an acknowledgment of transfer to the account of C, and that C was to pay

(1) *Ellis v. Hunt*, 3 T. R. 464.

(2) *Smith v. Goss*, 1 Camp. 282.

(3) *Mills v. Ball*, 2 Bos. & P. 457.

(4) *Northey v. Field*, 2 Esp. 613.

the charges from such a date. This acknowledgment B transferred to C. B having become bankrupt, A notified the wharfinger not to deliver the tallow to B's order. C brings *trover* against the wharfinger. Held, the wharfinger kept the tallow, as agent for C, and could not defend against the action on the ground of A's right to stop *in transitu*.(1)

70. Questions of stoppage *in transitu* have frequently arisen, in cases involving the mutual rights and duties of *principal and agent*.

71. Where goods are sold to an agent, upon his own credit, and the principal becomes bankrupt, the agent may stop them *in transitu*, and change their direction adverse to the bankrupt. But if the agent give a new direction to them, in furtherance of the principal's usual course of business, the goods will pass to the assignees of the latter, as being *in the order and disposition* of the bankrupt.(2)

72. But in general a factor cannot stop goods *in transitu*. His lien is lost by letting them go out of his possession.(3)*

73. B, a trader in London, ordered goods from D a correspondent in Dantzic. D to draw for the price upon F at Hamburg, who had agreed to accept bills, in consideration of receiving a commission. The bills of lading and invoices to be sent by D from Dantzic to F, and F to send them to B. F ac-

(1) Hawes v. Watson, 2 B. & C. 540.

(2) Hawkes v. Dunn, 1 Tyr. 413. 1 C. & J. 519.

(3) 1 E. 4. 3. 100.

* By the same means, a factor also loses his *lien* (technically so called) upon the principal's goods. Agreement between A, a manufacturer, and B, a merchant, in Great Britain, that B would ship goods manufactured by A to A's customers in the United States, pay the shipping charges, and make advances on goods shipped. A authorized an agent of B in the United States, to collect debts due A, and remit the money to B, who was to credit A accordingly. Money to be sent at B's risk, but drafts at A's. A, having received an order from a customer, forwarded the goods to B, who sent them to the purchaser. The latter accepted a part, but refused the rest. In a trustee process against A, and the purchaser as trustee, held, B had no lien upon the goods in the supposed trustee's hands, or the money due from him. B made his remittances of goods, not to *his* agent, but to a purchaser from A, and would have had no right to detain, open or sell, any part of them. Hall v. Jackson, 20 Pick. 194. See 8 Cranch, 418. 1 Wash. 178. 8 Pick. 73.

cepted the bills, and forwarded bills of lading, made to the order of the shippers, and unindorsed, to B; who received them, with the invoices and letter of advice, five days after committing an act of bankruptcy. F also becoming bankrupt, D took up the bills drawn upon him. Held, F had no right of stoppage *in transitu*, being a mere surety; and that the general agent of F at London, having obtained the bills of lading from B after his bankruptcy, under an agreement to sell the goods and apply the proceeds to the bills drawn against them, could not retain the property against the assignees of B, either in respect to F or a stoppage on account of D, who, after his possession and after *trover* brought by B's assignees, approved by letter of his receiving the bills of lading and goods: because there was no *adverse* stoppage *in transitu*, but the goods were obtained by agreement with B after his bankruptcy, even if the defendant could be regarded as agent for the shippers *at the time*, by relation.(1)

74. Goods were consigned on the joint account of A the consignor and B the consignee, with a bill of lading to deliver to B or his assigns, which B indorsed and delivered to C on condition of his making advances. C did not comply with this condition, but claimed to retain the goods as security for prior advances. Held, A might stop the goods *in transitu*. B, as a factor could not have *pledged*, though he might have sold, even the goods themselves. Hence he had no power to pledge the bill of lading. The proposition, sometimes stated, that the indorsement of a bill of lading operates like that of a bill of exchange, applies only to an absolute *sale* of the goods. C, in the exercise of reasonable caution, should have inquired for the letter accompanying the bill of lading, which would have shown in what relation B stood to A.(2)

75. A, a trader in England, gave an order to B, abroad, to ship to him certain goods. B purchased the goods on his own credit, not naming A to the vendor, and shipped them at cost, with the addition of a commission. A became bankrupt, hav-

(1) *Siffken v. Wray*, 6 E. 371. 1 B. & P. 563.

(2) *Newsom v. Thornton*, 6 E. 17.

ing previously accepted bills in part payment drawn by B for the price. The agent of B procured the bill of lading from a brother of A who had possession of it. In an action of *trover* brought by the assignees of A against the agent, held, B was so far a vendor in relation to A, that he had the right of stopping the goods *in transitu*. Under the circumstances, there was no privity between the original vendor and A, nor did A and B stand in the relation of principal and factor. Perhaps they were not vendee and vendor *for all purposes*, but B pledged his credit for A, and the latter was not liable to the original vendor, unless the goods came to his use, and he failed to pay B for them. The agent, having come lawfully into possession of the property, had a lien upon it till fully paid. It was doubted by the Court, whether there was any distinction, as to the right of *stoppage in transitu*, between a factor and a vendor. Lawrence, J., remarked, that if the right were confined to vendor and vendee, it would nearly put an end to its application in Great Britain. (1)

76. Where the vendor and vendee stand in the relation of principal and factor, and the latter is in advance to the former, has accepted bills drawn by him, and paid part of the freight; the vendor has still the right of stoppage *in transitu* (2)

77. On the other hand, where the factor of a vendee has the bill of lading, indorsed to order, and is under acceptances for the vendee on general account; the vendor may still stop the goods, before they come to the hands of such factor. The vendee and his factor being both bankrupt, the messenger, under the commission of the latter, went aboard the ship upon her arrival, and seized the cargo. The agent of the vendor had previously notified the captain to deliver the cargo to him; which the captain had agreed to do. Held, *trover* would lie in favor of the vendor against the assignee of the factor. If a factor has received the proceeds of goods sold, he has a lien to the extent of his indemnity; but he has no rights, prior to possession, in respect to the consignment, except those pertaining to his character as factor, and necessary to effect the object of the

(1) *Freese v. Wray*, 3 E. 93.

(2) 3 T. R. 119, 723. *Kinlock v. Craig*, 4 Bro. P. C. 47.

consignment. In this case, no mention was made of any *security* for advances. Hence, the factor had a lien only on the property in his possession. Circumstances having changed, so that the factor could not perform his duties as such, his assignee was not entitled to claim the benefit of a consignment, made as matter of personal confidence, and which the assignee could not execute. There was no assignment of the bill of lading, except to enable the factor to receive the goods, and carry them to the account of the principal. The plaintiff did all in his power to stop the goods, and enough to sustain this action.(1)

78. The defendant, a commission agent, purchased goods of the plaintiffs at Manchester for one A, informing the plaintiffs that they were to be sent to Lisbon. A had no warehouse at Manchester, and the goods were delivered to the defendant, to be forwarded as above-mentioned. A having failed, held, the plaintiffs might stop the goods in the hands of the defendant, because they were *in transitu* till their arrival at Lisbon.(2)

79. The plaintiff claimed certain goods, as the seller of them, from the defendants, to whom the goods were delivered to be forwarded to the defendants' correspondent, A, of Lisle. Upon the insolvency of A, the defendant withdrew the goods from the hands of B of Ostend, to whom they had sent them in a course of conveyance towards and for A at Lisle. The defendants insisted, as against the plaintiffs, that upon the delivery of the goods to them for B, the property was vested in B, in whose right, but for their own benefit, in account with B, they claimed to detain the goods. Held, the *transitus* was not at an end, and the plaintiff recovered (3)

80. It is said, that a bill of lading indorsed, and remaining in the hands of the original consignee, cannot interfere with the vendor's right to stop the goods before they arrive into the possession or under the control of the consignee, if he become bankrupt or insolvent.(4) Upon this point, however, there

(1) Patten v. Thompson, 5 M. & S. 349.

(2) Coates v. Railton, 6 B. & C. 422.

(3) Stokes v. La Riviere, (cited in *Bohlingk v. Inglis*.) 3 E. 381.

(4) Tucker v. Humphrey, 4 Bng. 522.

seems to be some conflict of authorities, the decision in each case being modified by its own peculiar circumstances.(1)

81. Where goods are shipped upon credit in a foreign port, in a vessel belonging to the consignee, and the master signs a bill of lading to deliver them to the consignee; the *transitus* is at an end, and there is no right of stoppage.(2)*

82. So a vendor may *regain* possession of the goods sold, by taking a bill of lading from the captain to whom they have been delivered. Thus, goods purchased by A from B were delivered, on board a ship chartered by A, in Russia. By a Russian ordinance, where goods had been delivered in this way, the vendor might regain possession of them by legal process upon the bankruptcy of the vendee, and retain them till payment of the price. B learning that A was insolvent, applied to the captain to sign bills of lading to his (B's) order, which was done, without issuing any legal process. Held, this proceeding was a substantial compliance with the Russian law, and that the captain was bound to deliver the goods in England to the order of B, not to the assignees of A.(3)

83. A consignor of goods advised his principal of his intention to make a consignment, put them on board a general ship, and delivered a bill of lading to the master, to be sent to the consignee. Held, the property hereby vested in the latter, so that he had no right to countermand the goods, though the vessel had not left her port of lading.(4)

84. Goods were sold free on board the vessel. Upon shipment, the agent of the vendor tendered a receipt, which the mate, in the captain's absence, refused to sign, and the next day

(1) See *Walter v. Ross*, 2 Wash. C. C. 283. 1 Pet. 386.

(2) *Bolin v. Hufnagle*, 1 Rawle, 9. (Huston and Smith, Js. dissented.)

(3) *Inglis v. Asherwood*, 1 E. 515.

(4) *Summernill v. Elder*, 1 Bin. 106.

* It was remarked in this case, that the master was a special agent of the vendee, delivery to whom was such to the latter; not a carrier or middle-man. He was under the control of the vendee, and might be dismissed by him. The vendor had no control over the goods after delivery to the master, and no connexion with him. On the other hand, the master could have no claim against the vendor, and in this respect differed from a carrier, who may claim freight from the vendor, if the vendee fails, or refuses to receive the goods. The circumstances showed an actual delivery.

signed a bill of lading to the vendee. Held, the right of stopping *in transitu* continued.(1)

85. A quantity of flour, purchased by the plaintiff was loaded in a general ship, and the master signed three bills of lading for delivery to the plaintiff or his assigns, but the bill expressed that the shipment was on account and at the risk of the shippers. A day or two after the shipment, and before the invoice, bill of lading, or letter of advice was sent to the consignee, the shipper, finding himself on the verge of insolvency, re-sold the flour to the defendant, of whom he purchased it on credit. The shipper was indebted to the consignee, and intended that the latter should apply the net proceeds of the property on account; but this intention was never communicated to him, nor the consignment made at his request. Held, the vendee had acquired no vested interest in the flour, and the owner might countermand it at any time before actual delivery to the plaintiff.(2)

86. After assignment of the bill of lading for valuable consideration, the vendor's right of stoppage is at an end; such assignment being equivalent to a transfer of the goods themselves.(3)*

87. Indorsement and delivery of a bill of lading have the effect of passing the goods to the indorsee, if done *bona fide*, for consideration, and without collusion; although the indorsee know that the original vendor has received payment only in fu-

(1) *Buck v. Hatfield*, 5 B. & A. 132.

(2) *Walter v. Ross*, 2 Wash. C. C. 283.

(3) *Lickbarrow v. Mason*, 4 Bro. P. C. 57. *Riddle v. Varnum*, 20 Pick. 280. *Warren v. Sproul*, 2 Marsh. 535. 5 T. R. 367. 6. 131. 2. 63. 3 H. Bl. 211.

* A bill of lading given before the goods are put on board is fraudulent, and even a *bona fide* indorsee of it gains no title to the property. *Osey v. Gardner*, Holt, 405. So, indorsement of a bill of lading without consideration passes no title to the goods. *Waring v. Cox*, 1 Camp. 369. The question as to the effect of such indorsement upon the right of stoppage seems to have received its first elaborate discussion in the case of *Lickbarrow v. Mason*, which was successively argued in the King's Bench, the Exchequer Chamber, and the House of Lords. The King's Bench, to which the case was sent back, adhered to their original judgment against the right, and this has ever since been considered as law. (See 2 T. R. 63. 1 H. Bl. 357. 2. 211. 5 T. R. 367. 683. 6 E. 20.)

ture acceptances. In such case, the latter has no right of stopping *in transitu*. It would be otherwise, if the vendor had expected or agreed that he should be paid, before any assignment of the bill of lading. So if the assignee of the bill of lading had known the vendee to be insolvent, and that he had not accepted the bills, or was not likely to pay. The true criterion as to the effect of such indorsement is, whether the assignee knew of such circumstances as rendered the instrument not fairly and honestly assignable.(1)

88. B ordered goods from A abroad, to be paid for at a future time. Bills of lading were signed by the captain of the ship, and one of them sent to B, who before arrival of the vessel sold the goods and indorsed the bill of lading to C. After arrival of the ship, and delivery of part of the goods to the agent of C, B became insolvent, not having paid A. Held, a delivery of part of the goods was that of the whole, and that A had no right of stoppage *in transitu*.(2)

89. Where a vendee fails to give the security which he promised, but obtains a bill of lading of the goods, which he indorses to a third person, and the indorsee brings *trover* against the wharfinger of the vendor having possession of the property; the insolvency of the vendee is no defence to the action, unless it was known to the plaintiff.(3)

90. Indorsement of the bill of lading by the vendor to a third person, while the goods remain *in transitu*, will authorize such third person to stop and bring an action for them.

91. The vendor of goods, having ascertained, while they remained in the hands of the wharfinger, that the vendee had stopped payment, indorsed the bill of lading to the plaintiff, without consideration, and directed him to take possession. The plaintiff accordingly demanded the goods, but delivery was refused. Held, at the time of such demand, the right of stoppage *in transitu* was not at an end, and that the plaintiff had a sufficient special property to maintain *trover*.(4)

(1) *Cuming v. Brown*, 9 E. 506. *Vertue v. Jewell*, 4 Camp. 31. *Tucker v. Humphrey*, 4 Bing. 522.

(2) *Slubey v. Heyward*, 2 H. Bl. 504.

(3) *Holliday v. Mann*, 2 Carr. & P. 509.

(4) *Morison v. Gray*, 9 Moore, 484.

92. Where the bill of lading has been indorsed only as security, the vendor has still the right of stoppage, subject to the actual claims of the assignee against the purchaser.

93. The vendee of goods indorsed the bill of lading, in consideration of an advance of money by the indorsee. Held, the vendor had still an equitable right of *quasi* stoppage *in transitu*; subject however to the right of the assignee to be repaid his advances. Such assignee, however, is bound to repay himself from other property of the vendee in his hands. If he does not, but retains the goods sold, for this purpose, the vendor himself acquires a lien on such other property for the price of the goods.(1)

94. A consignee, to whom the bill of lading was indorsed in blank, assigned it as security for acceptances less in amount than the value of the goods. The vendee and assignee then entered into an agreement to become partners in relation to the goods, which agreement showed that the consignor had not been paid. The vendee having become bankrupt, held, the vendor had still the right of stoppage *in transitu*, and that the assignee could not maintain *trover* against him for the goods.(2)

95. W shipped at Leghorn, twenty three casks of oil, on account and by order of L at Liverpool, and forwarded to him bills of lading. Before arrival of the oil, L indorsed the bill and deposited it with H, who advanced money upon it, having before done the same upon other goods of L deposited with him. Upon arrival of the oil, L having previously become bankrupt, and W not being paid, the agent of W claimed it from the shipmaster, B. B delivered the oil to H, who afterwards sold the goods of L and the oil of W. The debt from L to H was paid by the proceeds of L's goods. H paid his own debt, and deposited the net proceeds of the oil with a stranger, to await the issue of an arbitration in reference to all controversies between W and the assignees of L. The award was referred to the opinion of the Court. Held, W had no right to take possession of the oil at the time when his agent claimed it, upon the insolvency

(1) Westzinthius, 2 Nev. & M. 644.

(2) Salomons v. Nissen, 2 T. R. 674.

of L, because H had the right of property and possession, by indorsement of the bill of lading; and W had no right of possession, even after satisfaction of the lien of H. But, in Equity, the transfer to H was a mere pledge or mortgage, and therefore W, by the attempted stoppage *in transitu*, acquired a right to the goods in equity, subject to the lien of H against the assignees of L.(1)

96. The following cases present peculiar circumstances, under which the right of stoppage *in transitu* has been allowed, notwithstanding an indorsement of the bill of lading.

97. A, residing at Boston, having ordered certain goods from B at Liverpool, B shipped them in a general freighting vessel, which was consigned to B and designated by A. A bill of lading was obtained by B, by which the goods were to be delivered to A. B withheld the bill of lading from A, and afterwards enclosed it with an invoice in a letter to his (B's) agent, with directions to deliver it to A only on condition of his paying for the goods. There was a balance due from B, independently of these goods. Before their arrival at Boston, A became insolvent, and assigned his property to the plaintiff for benefit of creditors, agreeing to indorse and deliver the bill of lading to the plaintiff, when received. The bill of lading was received by A after the assignment, handed to the plaintiff without indorsement, and indorsed after this suit was commenced. Upon arrival of the goods, the defendant, as agent of B, being also owner of the vessel, obtained possession of them; and the plaintiff brings *trover* against him. Held, the action could not be maintained, but that B had the right of *stoppage in transitu* as against the plaintiff, although at the time of assignment the latter supposed there was a balance due A, at the execution of the orders for shipment of the goods. The plaintiff must be held to stand precisely in the situation of A himself, and not as a *bona fide* purchaser, claiming under a bill of lading, without notice of any lien, set-off or adverse claim. He could not claim under the indorsement, because this was not made till after commencement of suit. Nor did the agreement to indorse

(1) Westzinthus, &c., 5 Barn & Ad. 817.

make any difference. The vendor intended to prevent such indorsement by enclosing the bill of lading to his own agent, to be delivered only on payment or security. Nor was the plaintiff a purchaser without notice. There was no advance of money, credit or dealing on the strength of the goods. He knew of the vendee's insolvency, and that the vendor was a creditor and had the right of stoppage; and this was sufficient to put him upon inquiry.(1)

98. A, a merchant in England, sent goods to B in Quebec for sale on his account. Before making a sale, on ascertaining the proceeds of the goods, B shipped to A three cargoes of timber, to credit in account. Two of them arrived, and against the third, while yet *in transitu*, B drew a bill of exchange for the amount of it. In the mean time, A dishonored the bill and failed, having previously received and indorsed the bill of lading. Held, B, under these circumstances, retained the right of stoppage *in transitu*, although the mutual accounts between the parties had not been adjusted, and, his agent having notified the indorsee of the bill of lading of his claim, though having received no specific authority to do so, that B might maintain *trove*r against the ship-owner, who had delivered the goods to the indorsee. The case might have been otherwise, had B sent his cargoes *in return* for the goods previously forwarded to him by A. But, as a bill was specifically drawn to meet the third cargo, B was not bound to show that upon a final settlement, A would be indebted to him.(2)

99. There are other documentary evidences of title, as to which the question arises, whether possession by the vendee will put an end to the right of stoppage *in transitu*. It has been held that the right is not barred by the mere possession of *an invoice*, which is only a mercantile name for a bill of parcels or shop-bill.(3)

100. A vendee of goods lodged an order to deliver them with the wharfinger, who transferred them in his books to the name of the vendee. Held, the wharfinger must hold as agent of the

(1) *Stanton v. Eager*, 16 Pick. 467.

(2) *Wood v. Jones*, 7 D. & R. 126.

(3) *Tucker v. Humphreys*, 4 Bing. 522. *Hammond v. Anderson*, 2 Camp. 243.

latter, and the right of stopping *in transitu* was gone. So a *delivery note* lodged with the wharfinger passes the property, though no transfer be made in the books.(1)

101. The vendee of goods gave to a third person a *shipping note* of them, and a *delivery order* on the wharfinger to deliver the goods upon their arrival. Held, they were still subject to stoppage *in transitu*. A shipping note does not amount to a bill of lading, which is exactly like a bill of exchange, and passes the property by indorsement, not by delivery alone. But a shipping note is not indorsable.(2)

102. It has been said,(3) that there is no case, in which, after a re-sale of goods, and payment of the price, or money advanced on the credit of the goods by the second vendee, there had been a stoppage *in transitu*; and that under these circumstances the law will not sanction such stoppage. But in other cases it is held, that a re-sale by, and payment to, the first purchaser, does not destroy the right of stopping *in transitu*. And this doctrine is based upon the general principle of law, that one who has not the property and right of possession in goods, cannot sell them; hence if the original vendor chooses to retain or stop them *in transitu*, the second vendee is in no better situation than the first.(4)

103. If the first vendor of goods does any thing which can be construed as sanctioning a re-sale by his vendee, this destroys his right of stopping *in transitu*.(5)

104. A vendor delivered to the vendee a bill of parcels for goods lying in a public store, and an order on the keeper for their delivery; and the vendee re-sold them for valuable consideration to a *bona fide* purchaser. Some suspicious circumstances attended the transaction, which however were left to the jury. Held, there was no right of stoppage *in transitu*, and the Court would not presume fraud nor grant a new trial.(6)

105. Sale of a specific quantity of oil then in existence, to be

(1) *Lucas v. Dorrien*, 7 Taun. 278.

(2) *Akerman v. Humphery*, 1 Car. & P. 53.

(3) *Lickbarrow v. Mason*, 6 E. 34 n. *Hunn v. Bowne*, 2 Caines, 38.

(4) *Craven v. Ryder*, 6 Taun. 433. *Dixon v. Yates*, 5 Barn. & Ad. 333. (qu.)

(5) *Hawes v. Watson*, 2 B. & C. 343.

(6) *Hollingsworth v. Napier*, 3 Caines, 182.

at the vendee's risk. The place where the oil was, and the ship which was to carry it, were named. There was a complete transfer to the vendee, and payment was made. The vendee sold to A, with an order to the vendor to deliver to him, upon which the vendor indorsed his acceptance. Held, the vendor thereby attorned to the sale and became the bailee of A, and the right of stopping *in transitu* was at an end.(1)

106. A sold to B timber lying at his (A's) wharf for bills on time. The timber was then marked by B, and small parts of it sent to two different places by A. Before maturity of the bills, B sold the whole to C, who paid B for it. C gave notice to A, who said "it was very well," and C then, in presence of A, marked all the timber lying at A's wharf, and afterwards that part which had been sent away. Before maturity of the bills, B failed. Held, A could not reclaim any part of the property, as being *in transitu*.(2)

107. A sold to B a quantity of cotton, taking his note at sixty days, and retaining possession of the cotton. B informed C, that he had cotton for sale in A's store, and C thereupon called on A and requested to see it. A ordered his clerk to exhibit the cotton, having a mark upon it. C examined the cotton on account of D, and purchased it of B, who took D's notes, which were subsequently paid, and gave an order upon A for delivery. The order was not immediately presented, nor any notice given to A, in whose possession the property was allowed to remain. B afterwards became insolvent. A placed B's note, together with the cotton in the hands of E, as security for money borrowed. The day before maturity of the note, C produced to A the order for delivery given by B, bearing date long previously, and demanded the cotton, but A refused to deliver it. B's note having been protested, E purchases the cotton, and D brings an action of *trover* against him. Upon the trial, A testified that he did not consider the property as left for storage. Held, as the cotton was first given to the defendant to sell on account of A, after the insolvency of B, then deposited as a pledge, and after-

(1) *Whitehouse v. Frost*, 12 E. 614.

(2) *Stoveld v. Hughes*, 14 E. 308.

wards sold; the defendant stood in the same position that A would have done. The sale being on credit, there was no lien, and no right of stoppage *in transitu* against an innocent purchaser. (Kent, J., dissented; upon the ground that there was no delivery, nor any application for delivery, till after the insolvency of B; that the defendant had as good an equity as the plaintiff, and having possession besides, his title must prevail.)(1)

108. A vendor may stop the goods *in transitu*, notwithstanding a part payment by the vendee. If it were otherwise, this right would be lost by payment of any part of the price, however small; or even of mere earnest. Nor is he bound to refund the part payment, or to pay freight.(2)

109. Where bills have been given in payment, but not expressly accepted as such, the vendor may stop *in transitu*.(3)

110. Where the vendor of goods receives payment by a bill of exchange, drawn by the vendee, he has no right of stoppage, unless the bill is dishonored. If it were otherwise, the right of property would be in abeyance till the bill became due.(4)

111. Where a debtor consigns goods to his creditor, he has no right of stoppage *in transitu*, on account of the insolvency of the latter, because he loses nothing thereby—it is a mere appropriation of his own funds. This right exists only where the property has not been paid for.(5)

112. A was indebted to B on balance of accounts, including bills of exchange still running, which were accepted by B for A. A consigned goods to B, to meet this balance. Held, the property became vested in B by the shipment, and upon B's insolvency before payment of the bills, A had no right of stopping *in transitu*.(6)

(1) Hunn v. Bowne, 2 Caines, 38.

(2) Hodgson v. Loy, 7 T. R. 440. Wiseman v. Vandeput, 2 Vern. 203. Newhall v. Vargas, 1 Shepl. 93. 5 Ohio, 98.

(3) 7 T. R. 64.

(4) Per Park, J., *Ib.* 518. Davis v. Reynolds, 1 Star. 115. Wolley v. Montgomery, 3 E. 585.

(5) Clark v. Mauran, 3 Paige, 373. Stanton v. Eager, 16 Pick. 475. Wood v. Roach, 1 Yeates, 177.

(6) Vertue v. Jewell, 4 Camp. 31.

113. Where money is transmitted on a special account, and for a special purpose, upon the bankruptcy of the party to whom it is sent, the other may stop the money *in transitu*. Otherwise, in case of a general remittance from debtor to creditor.(1)

114. With regard to the persons, by whom this right may be exercised, it is held, that where the vendor is an alien enemy, but the sale is justifiable under a license, he has the right of stoppage *in transitu*.(2)

115. Where a British merchant receives from the Crown a trading license, to send his ship in ballast to the port of an enemy, for the purpose of there receiving and loading a cargo, and importing it to England; inasmuch as the act of the purchaser is thus legalized, the sale is legalized also, as it respects the vendor. Hence he has the right of stopping the goods *in transitu* after their arrival at a British port, the vendee having become insolvent, and also to employ an agent there for that purpose. It was remarked by Ld. Ellenborough, that the crown does not give any man a roving commission, to steal from or defraud even enemies of their property. If it authorizes the subject to purchase from the enemy, it must be taken to authorize the enemy to sell. There is an obvious distinction between this case, and that of an alien enemy's bringing a suit for the price of goods sold. In the latter case, the goods have already become the property of the vendee; but here, the law merely forbids him to take them without payment.(3)

(1) *Smith v. Bowles*, 2 Esp. 578.

(2) 15 E. 419.

(3) *Ib*

CHAPTER IX.



WARRANTY.

SECTION I.—GENERAL PRINCIPLES RELATING TO WARRANTY OF CHATTELS, IN RESPECT TO QUALITY.

- 1—2. *Distinction between the civil and the common law.*
- 10. *Fair price does not imply warranty.*
- 13. *Interior of an article sold in bales.*
- 15. *Sale of slave.*
- 16. *False assertion of value or income.*
- 17. *Decided cases.*
- 23. *Exceptions to the general rule.*
- 26. *Visible defects, and sale by inspection.*

SECTION II.—WORDS NECESSARY TO A WARRANTY.

SECTION III.—WHAT IS A BREACH OF WARRANTY.

SECTION IV.—SALE BY SAMPLE.

SECTION V.—SALE OF PROVISIONS.

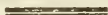
SECTION VI.—WHAT IS NECESSARY TO SUSTAIN A SUIT OR DEFENCE UPON A WARRANTY, OR TO RESCIND A SALE.

SECTION VII.—FORM OF ACTION AND MANNER OF PLEADING IN SUITS UPON WARRANTY.

SECTION VIII.—EVIDENCE IN CASE OF WARRANTY.

SECTION IX.—DAMAGES IN CASE OF WARRANTY.

SECTION X.—WARRANTY OF TITLE.



SECTION I.—GENERAL PRINCIPLES RELATING TO WARRANTY OF CHATTELS, IN RESPECT TO QUALITY.

1. The following general principles have been laid down upon the subject of the warranty of chattels.

2. By the *civil law*, every man is bound to warrant the thing that he selleth, albeit there is no express warranty;* but the *common law* bindeth him not, unless there is a warranty in deed or law.(1)

3. By the *civil law*, in case of sale, if there is any error, either as to the substance of the thing sold, or any of its essential qualities, without which it would not be the thing which it purports to be; the sale is void. As where metal is sold for silver bullion, which proves to be gold or brass; or where plated are sold for silver candlesticks. But by the common law the sale is valid under similar circumstances, unless the article was so situated that it could not be seen and examined. By the civil law, moreover, there is an implied warranty, not only that the thing sold is free from defects which render it unfit for its intended purpose, but also from those which reduce its value below that of a sound article. In the former case, the vendee may return the thing sold, and rescind the sale by a *redhibitory* action to recover the price; while in the latter, he might sustain an *actio estimatoria* for the difference in value between the article sold

(1) Co. Litt. 102 a.

* The rule of the civil law is, *caveat venditor*, and the seller is liable for any latent defect. Chancellor Kent remarks, that if it were *res integra*, he should be overcome by the reasoning of the civilians. Dig. lib. 1, tit. 2, ch. 13, n. 1. 18 Wend. 453. 2 Caines, 55.

and a sound article of the same kind. In either of the above cases, the vendor may clear himself from all liability by an express stipulation to that effect, unless he is chargeable with knowledge and concealment of the defect.(1)

4. By the common law, where, upon the sale of chattels, there is neither warranty nor fraud, the vendee purchases at his peril, and can maintain no action for a defect of quality.(2) But, it is said, this principle applies, only where the property is exhibited.(3) Also, that the only exception to it is where an examination at the sale is morally impossible; as where goods are sold before they arrive or are landed. Mere *difficulty* of examining is not sufficient.(4)

5. The law requires truth and good faith in dealings, and these forbid a false representation, made knowingly, or the concealment of material facts exclusively known to the party who conceals them. But where both parties know or might discover the facts, and there is no misrepresentation, the law provides no remedy. And fraud must be proved, not presumed.(5)*

6. If a man sell wine that is corrupted, or a horse that is diseased, and no warranty; it is at the buyer's peril, and his eyes and taste ought to be his judges in that case.(6)

7. The law presumes every dealer in articles brought to market to know all the circumstances usually attendant on such car-

(1) Poth. on Obligees, No. 18. Poth. Con. of Sale, No. 34. Seixas v. Wood, 2 Caines, 48. Sweet v. Colgate, 20 John. 196. Voct. on the Pand. b. 21. tit. 1. s. 4, 5. Poth. Cont. of Sale, No. 182. 18 Wend. 432, 3

(2) 4 Conn. 428. Seixas v. Wood, 2 Caines, 48. Perry v. Aaron, 1 John. 120. Defreeze v. Trumper, 1 John. 274.

(3) Sands v. Taylor, 5 John. 404.

(4) Hyatt v. Boyle, 5 Gill. & J. 110.

(5) Junkins v. Simpson, 2 Shepl. 367.

(6) Fitzh. N. B. 94 C.

* If a party makes a contract with another, whom he knows to be laboring under a delusion materially affecting the contract, and suffers him to be operated upon by that delusion, the contract is void. Hill v. Gray, 1 Star. 434. So, if the seller practice any intentional deception to disguise latent defects; this is a fraud for which he is liable to an action. Schneider v. Heath, 3 Camp. 506. The rule of *caveat emptor* is said to have been adopted in Massachusetts, Pennsylvania and New York. Yelv. (Metcalf's) 21 b.

goes. Hence the ignorance of a purchaser upon this subject is no ground for a refusal to accept the article sold.(1)*

8. A guaranty of the quantity of a cargo sold, is not a warranty that the whole is sound.(2)

9. A fair, merchantable price does not raise an implied warranty; and, if there be no warranty, and the vendor sell the thing for such as he believes it to be, without fraud, he is not liable for a latent defect.(3)†

10. A sale for a sound price, without fraud or express warranty, does not raise an implied warranty, that the article is *merchantable*; nor is the vendor liable, though it be not fit for all the purposes to which it is usually applied.

11. Thus the defendant sold to the plaintiff a quantity of flour made of grown wheat, and therefore unfit for ordinary bread, and unprofitable for making starch. The flour was sold as *E. S. B.* flour, meaning *E. S. Beach's brand*, and it was really, according to the weight of the testimony, of this description. The flour was also merchantable and fit to be used for some purposes, being good for hard or ship bread, and more than usually valuable to make paste for paper hangers. Some witnesses however thought that it was not merchantable, nor good for any purpose. The plaintiff was a manufacturer of starch, and had several times purchased flour of the defendant to be used for this purpose, but there was no evidence that he did so in the

(1) *Sands v. Taylor*, 5 John. 405.

(2) *Jones v. Murray*, 3 Monr. 84.

(3) *Parkinson v. Lee*, 2 E. 314. (Co. Litt. 102 a. Cro. Jac. 197. Sir. 146. Yelv. 21. 2 Ld. Ray. 1121. *Oneida, &c. v. Lawrence*, 4 Cow. 440. Doug. 20. Alley, 91 acc.)

* So on the other hand, it has been held, that a vendee is not bound to answer inquiries of the vendor as to the state of the market. *Blydenburg v. Welsh*, Bald. 331.

† It was formerly the doctrine in Connecticut, that warranty is implied merely from a price. And this principle was sanctioned by Judge Swift in his treatise, though he states the rule as different in England. And it is stated to be now the law in Connecticut, North Carolina and South Carolina, that a sound price implies warranty. *Bailey v. Nichols*, 2 Root, 497. 1 Swift's Dig. 384, 5. *Timrod v. Shoolbred*, 1 Bay, 324. 2. 380. *Galbraith v. Wythe*, 1 Hayw. 464, Yelv. (*Metcalf's*) 21 b.

present instance. Held, the defendant was not liable, as upon an implied warranty.(1)

12. No proof of a warranty, that each piece of goods sold shall be of a certain value, arises from the fact, that this is the price at which the vendee was to take the property. If so, warranty would be universal, unless there were a stipulation to the contrary.(2)

13. Upon a sale of hemp in bales, there is no implied warranty that the interior agrees with the exterior. If there is fraud, the vendor is not liable, unless proved to be privy to it.(3)

14. The vendee of hemp, sold in bales, opened and examined several of them, and had the power of doing so with the rest, but did not open them. The hemp contained in the bales which were not opened, did not correspond with that in those which were opened. The interior was not only different from the exterior, but contained a large quantity of *tow*. The vendee opened and worked some of the bales, and offered to return the rest. The price paid was \$210 per ton, but the real value only \$150. A letter accompanying the invoice spoke of *the first quality* hemp, *the same as sold to you*. The vendor also represented it to others to whom it was offered for sale, as *first quality*. But he also told the vendee that he must *examine well for himself*. The vendee disavowed charging the vendor with *fraud*, but brought an action against him, alleging both deceit and a warranty. Held, this was not a sale by sample, nor was there an implied warranty.(4) (See s. 4.)

15. Where *a slave* is sold for a sum of money which is a sound and full price for a good and honest slave, and he proves to be bad and dishonest, which the vendor knew; no action lies for a fraudulent concealment. But where the vendor gave a receipt "in full payment" for a slave, and warranted him sound in body and mind, and a slave for life, and also gave an order upon the sheriff, who had him in custody to give him up, and,

(1) Wright v. Hart, 18 Wend. 449. Hart v. Wright, 17 Ib. 267. Dean v. Mason, 4 Conn. 428.

(2) Snell v. Moses, 1 John. 96.

(3) Salisbury v. Stainer, 19 Wend. 159.

(4) Ib.

on arrival at the gaol, it was found that the slave had cut his throat, and he soon died; in a suit to recover back the price, held, the intention of the parties was, that the slave should be delivered; the agreement was for a *living and sound slave*, and, if he had cut his throat before the contract was made, the action was maintained. (1)*

16. The law appears to be well settled, that a *false assertion* by the vendor, as to the *value* of the property sold, or the amount of future income from it, where there is neither a warranty as to the value, nor a misrepresentation of any fact respecting the property, which is not mere matter of opinion, forms no substantive ground for relief in law or equity. A naked assertion as to value does not imply knowledge, but must be understood by the vendee as mere matter of judgment or opinion; and the vendee is as competent to form a judgment as the vendor. Where a fact is equally known to both parties, the law presumes that each relies on his own judgment. The circumstance of the vendor's having offered the property for less than the price obtained, perhaps implies that he does not think it worth this price. But where no inquiry is made about such offer, he is not bound to disclose it. (2)† (See s. 26.)

(1) Fleming v. Slocum, 18 John. 403. Franklin v. Long, 7 Gill & J. 407.

(2) Speiglemmyer v. Crawford, 6 Paige, 254. Sims v. Klein, Breeze, 234.

* Parol proof was held inadmissible, of an agreement, prior to the receipt, to purchase at the sum therein named, and that the vendor agreed, *on payment*, to deliver the slave.

† Where the vendor of a farm falsely says that a certain person would have given a certain price for it, this is no foundation for an action by the vendee. It is mere ground of estimation, upon which no person of prudence would rely. Otherwise, where the declaration is, that the property pays a certain rent. Roberts on Frauds, 523. The action of Harvey v. Young, (Yelv. 21 a.) was an action on the case for deceit in the sale of a term for years, which the vendor affirmed to be worth £150, but which proved to be worth only £100. A distinction was taken between mere *affirmation*, as in this case, and *warranty*; but no decision seems to have been made. This distinction was afterwards overruled in Pasley v. Freeman, 3 T. R. 57. The true principle is stated to be, that where an affirmation is a *mere assertion*, that is, where no warranty is intended, and the vendee may judge for himself, as in case of a mere opinion; or where the truth may be known by the exercise of common prudence; no action lies. Yelv. (Metcalf's) 21 a. n.

17. The following cases illustrate the general doctrines above stated.

18. Where, in an action by a vendee, the declaration alleged, *in the breach*, that the defendant, contriving to injure the plaintiff, did not perform his undertaking, but craftily and subtilly deceived the plaintiff, in selling an unsound article, but contained no substantive allegation of fraud; held, evidence of fraud was not admissible; that the breach alone averred fraud, the body of the declaration merely stating *a promise*, in the form which was anciently always used in *assumpsit*. The sale was of *deer-skins*, which proved to be not merchantable, damaged, worm-eaten, mildewed and rotten. It was held in this case, that there was no difference in principle between things of marketable value, and those of mere fancy.(1)

19. Upon a sale of tobacco, a bill of parcels was given, as follows—"24 kegs tobacco, branded (Parkin) at 4 months, weighing, &c. at 13½ cents." A, the vendor received the tobacco on commission, and guaranteed the sale. The purchase took place at A's counting-room, where the tobacco was. It was branded conformably to the bill, and not examined by either party before or at the time of sale. The price was that of merchantable tobacco, and the brand a favorite one, varying in price from 8 to 13½ cents. The tobacco proved to be in part unsound, none of it was re-sold, and the vendee offered to return the bad portion, and pay for the rest. In a suit brought for the price, held there was no implied warranty of quality, but the vendor's agreement was fulfilled by the brand.(2)

20. A transferred to B stock in a turnpike company, which at the time appeared by the books to have been fully paid up by a credit of interest on the amount before paid in, according to a resolution of the directors. This resolution was after the above transfer repealed, and the stockholders were called upon to pay in the amount before allowed for interest. B accordingly paid in the amount to the company on the shares transferred to him, and brings an action against A to recover that amount,

(1) Dean v. Mason, 4 Conn. 428.

(2) Hyatt v. Boyle, 5 Gill & J. 110.

Held, the suit could not be maintained, as there was neither fraud nor warranty. The receipt given by A to B for the money, was fairly to be understood as stating that thirty-five dollars had been paid upon each share. But B knew in what manner it was paid, before he bought. He was not misled as to the facts. And A was not to be held chargeable with any subsequent risk.(1)

21. In an action of assumpsit, the declaration alleged, that the defendant agreed to sell and deliver to the plaintiff eighty-nine casks of lime, of good quality, but that he delivered that number of casks, which were unmerchantable and of little value. There was also a count for money had and received. The casks were proved to contain a mixture of sand and stones, which was of no value and could not be used as lime; but there was no warranty, nor any evidence of knowledge on the part of the defendant. He was master of a coaster, and received the casks of one A at Thomastown, to carry on freight to Boston, and there sell them on A's account; but made no disclosure of his being an agent. The plaintiff sold some of the casks, and did not return the rest. A bill of parcels was given of *eighty-nine casks of lime, at ten shillings per cask*; and the casks were branded by an inspector of lime. Held, no action could be sustained upon the first count; nor would *money had and received* lie, because the casks were of some value and not returned. But the Court suggested that a new declaration might be filed, upon which the plaintiff might recover.(2)

22. The defendants requested the plaintiffs to exchange a quantity of Burgundy wine, which about a year before they had bought from the plaintiffs, for a quantity of Champagne wine. The plaintiffs consented, and the exchange took place. When received by the defendants, the Burgundy was of the first quality; but when returned to the plaintiffs it was sour and fit only for vinegar. The defendants neither made any representation, nor were guilty of any fraud, in relation to the wine returned. Held, the plaintiffs could not maintain an action for the value

(1) *Cunningham v. Speer*, 13 John. 392.

(2) *Conner v. Henderson*, 15 Mass. 319.

of the Champagne, or to recover damages for the bad quality of the Burgundy.(1)

23. The exceptions, *if any*, to the common law rule as to warranty, are, that if a manufacturer sell his own articles, ordered for a particular use, there is an implied warranty that they are fit for such use; in the sale of *provisions* for domestic consumption, that they are not unwholesome and deleterious; and in case of an order for a certain kind or quality of goods, that those furnished are of such kind. Some judges in recent English cases have gone thus far, and even further; holding to an implied warranty that the thing is merchantable or fit for some purpose. But Chancellor Kent thinks this is not the common law or law of New York. Perhaps if the article is of no value either to the vendor or the vendee, this would be a good defence to a suit for the price; not however on the ground of warranty, but a failure of consideration.(2)

24. It has been held, that under an agreement to furnish manufactured goods, however low the price, the articles must be *merchantable*. Thus where a publican agreed with a brewer to take all his beer of him, held, the latter was bound to supply him with beer of a fair, merchantable quality.(3)

25. The principle is elsewhere laid down, that where a vendor of manufactured articles is himself the workman, there is an implied warranty that they are executed in workmanlike manner. Otherwise, if he is the seller only.(4)

26. A warranty does not apply to defects which are *visible*. Thus where a negro was sold, having a defect in his left arm, which made it thin and crooked, and was plainly visible, and which the vendor offered to exhibit; held, he was not liable upon the warranty.(5)* But it is fraud to sell a horse nearly

(1) *La Neuville v. Nourse*, 3 Camp. 351.

(2) *Per Walworth, Ch'r.*, 18 Wend. 453, 4.

(3) *Laing v. Fidgeon*, 6 Taun. 108. *Holcombe v. Hewson*, 2 Camp. 391. 3 Ib. 286.

(4) *Cousens v. Paddon*, 2 Crompt. M. & R. 550.

(5) *Schuyler v. Russ*, 2 Caines, 202.

* So a warranty of *land* does not cover *patent* defects. But if these are industriously concealed by the vendor, Equity will not decree specific performance. 10 Ves. 505. 1 Bro. 440.

blind, for a sound price, knowing and not declaring his blindness; though the purchaser examined the horse; it appearing that the defect could not be discerned at first view.(1)

27. Where one purchases an article *on inspection*, and the vendor affirms that it is worth much more than the real value, no action lies for such affirmation, as there is neither fraud nor a warranty. In this case, the vendor represented, that he had been often offered fifty dollars for the article, when in fact it was worth but twenty-five. The vendee merely saw, and neither examined nor tried it. Held, he could not maintain an action of deceit.(2) (See *Supra*, 16.)

28. The principle, that a vendor is not answerable for defects in the thing sold without warranty, has been extended so far, as to enable him to recover in an action against the vendee, the *apparent* value of the article at the time of sale, though no price was expressly agreed upon. Thus where A sold B a bowsprit, apparently sound, but which after being used proved to be rotten; held, A might recover the apparent value of the article at the time of sale.(3)*

SECTION II.—WORDS NECESSARY TO A WARRANTY.

1. The word *warrant*, or any other particular phraseology, is not necessary to constitute a warranty.

(1) *Hughes v. Robertson*, 1 Monr. 216.

(2) *Davis v. Meeker*, 5 John. 354.

(3) *Bluett v. Osborn*, 1 Star. 384.

* The principles above stated may be considered as embodying the general law, on the subject of the warranty of chattels. It will be observed, however, that they are somewhat loose and unsettled; and it has been said with some truth, that the decisions relating to warranty are anomalous, and no precise principle is to be extracted from them. By the civil law (see *supra*, 1,) a sound price warrants a sound article. The common law Courts started with the rule, that the maxim *caveat emptor*, disposes of all but warranty of title and wilful misrepresentation; and that the form of action must be "ex delicto." But it was subsequently held, that the vendor's *recommendation*, though not itself a warranty, is evidence of one. *Per Gibson*, Ch. J., Law Reporter, Feb. 1840, p. 301.

2. A *representation* of the state of the thing sold, or a direct and express *affirmation* of its quality and condition, showing an intention to warrant, and so understood and relied upon, instead of the mere expression of an opinion; is a sufficient warranty. But the subject should be within the particular knowledge of the vendor. The question is for the jury, under the advice of the Court.(1)*

3. The words "I promise you the horse is sound," it seems, are a warranty of soundness.(2)

4. Advertisement of *good Caraccas coffee*. The plaintiff purchased a quantity of the article, and after examination, shipped it to Spain, not knowing, however, the difference, between this and other kinds of coffee. The coffee was in fact the growth of some other place than Caraccas. Held, the advertisement was equivalent to a warranty that the article was of the kind described.(3)

5. A sold a slave to B, and gave the following writing, "I state that I have sold her as a sound and healthy negro." Held, this was a warranty, being an *agreement* for soundness, and something more than a mere affirmation.(4)

6. The vendor of a horse declared that it was not lame and that "he would not be afraid to warrant it." Held, this amounted to a warranty.(5)

7. The plaintiff, purchasing a mare of the defendant, said, "she is sound, of course." "Yes, to the best of my knowledge." "Will you warrant her?" "I never warrant—I would not even warrant myself." Held, this was an express

(1) Chapman v. (Murch, qu.) 19 John. 290. Oneida, &c. v. Lawrence, 4 Cow. 440. 2 Caines, 56. Peake on Evi. 228. 10 Wend. 411. But see Dyer, 75.

(2) Chapman v. Murch, 19 John. 290.

(3) Bradford v. Manly, 13 Mass. 145, N. P.

(4) Vanada v. Helm, 2 J. J. Marsh. 129.

(5) Cook v. Moseley, 13 Wend. 277.

* The case of a mere *judgment or opinion* in regard to a thing sold is said not to be analogous to the description in a policy of insurance of a ship as *neutral* or *American*. The policy is a special contract, in which the whole agreement is precisely stated. No question is ever made, but that the assured knew and meant to be understood to mean that the ship was of that character. 2 Caines, 56. See s. 1, 16.

warranty, being a representation made by the vendor at the sale.(1)

8. The defendant gave a bill of sale of a female negro, containing the clauses "grant, bargain and sell," "covenant to warrant and defend," and "being of sound wind and limb and free from all disease." Held, this was not mere *description*, but the averment of a fact, amounting to an express covenant or warranty of soundness; and that the fact of the negro's being subject to fits was a breach of such warranty.(2)

9. The defendant agreed to sell the plaintiff "Scott & Co's 75 barrels mess pork at 53s. per barrel." It was proved that mess pork cured by Scott & Co. brought 2s. 6d. more than any other kind; and witnesses, connected with the trade, were allowed to testify to the proper construction of the contract. Held, the contract imported a warranty that the pork was *cured*, not merely *consigned*, by Scott & Co.; and that the above testimony was rightly admitted. The plaintiff relied, for the quality of the article, upon the character of the persons mentioned. The case is like that of the picture of a particular artist, which must have been painted by him, not merely have hung in his *studio*. The declaration in this case alleged, that the pork was not of the kind agreed for, but of an inferior kind, and not the pork of Scott & Co. Held, this was sufficient, without alleging the *legal effect* of the contract, as importing that the article should be *manufactured* by Scott & Co. Held also, that the measure of damages was the difference between the invoice price and the amount produced by re-sale.(3)

10. A horse was sold as sound in all respects, except having the *colt-distemper*. It was proved that the horse had a defluxion from the nose; but the vendor assured the purchaser that this was only an ordinary distemper to which colts are subject, and had continued only a few days. It was further proved, that the horse had shown some symptoms of this disease during the whole time—ten or twelve months—that the vendor had owned him; and the evidence was very strong, that he had the *glan-*

(1) Wood v. Smith, 4 Car. & P. 45.

(2) Cramer v. Bradshaw, 10 John. 484.

(3) Powell v. Horton, 3 Scott, 110.

ders, an incurable disorder. It was also proved that the person of whom the vendor purchased, passed him off as a *glandered* horse, or refused to say that he was not such; that the vendor was informed by a third person what was the true disease, and said himself he feared it was or would be worse than the distemper. Held, though no particular form of words is necessary to a warranty, yet the naked averment of a fact is neither a warranty nor evidence of one, but may be taken into consideration with other circumstances, and the jury must infer from the whole case, that the vendor actually, not constructively, consented to be bound for the truth of his representation. The question is for the jury. It was further held, that a positive averment, at the time, of a material fact, cannot be taken as part or parcel of the contract.(1)

11. A warranty must either be *upon the sale*, and one of its terms, or, if subsequent, it must be express, and founded upon some new consideration. But though a warranty should generally take place at the time of sale, yet if the vendor *offers to warrant* when the parties are first in treaty; this shall be held a warranty, though the sale take place some days afterwards.(2)

12. And a mere affirmation will be more especially construed as a warranty, where this construction is favored by the previous communication between the parties. Thus where the plaintiff told the defendant, upon a proposal to exchange horses, that he would not thus exchange, unless the defendant would warrant his horse to be sound, and the defendant thereupon said, "he is a sound horse except the bunch on his leg;" held, this was a warranty of soundness, subject to the exception mentioned.(3)

13. Contrary to the tenor of the above decisions, it has been said, all the cases of an affirmation's being an implied warranty relate to the *title* only, not to the *quality* of the thing sold.(4)

14. The defendant sold to the plaintiff a horse, "to be taken

(1) *M'Farland v. Newman*, Penn. Sept. 1839, Law Reporter, Feb. 1840, p. 301.

(2) *Hogins v. Plympton*, 11 Pick. 100. *Wilmot v. Hurd*, 11 Wend. 584. *Lysney v. Selby*, Ld. Ray. 1120.

(3) *Roberts v. Morgan*, 2 Cow. 438. *Whitney v. Sutton*, 10 Wend. 411.

(4) *Per Thompson, J., Wilson v. Marsh*, 1 John. 504.

as he is, sound or unsound." Held, the vendor was not liable for the unsoundness of the horse, though he knew and concealed it at the time of sale.* But if, in connexion with the expression *sound or unsound*, the vendor makes any misrepresentation, he is liable. As where the horse was thin and had a bunch upon his neck, both arising from disease, and the vendor represented that the thinness was caused by a long journey, and the bunch by bleeding; held, he was liable to an action.(1)

15. Sale of a ship, *with all faults*. There were latent defects in the vessel, known to the vendor, but not to the vendee, nor discoverable by any attention on his part. Held, the vendor was liable to an action.(2) This principle, however, has been overruled in a subsequent case,(3) except where there is some artifice used to disguise; and this last case is said never to have been questioned.(4) The same rule applies to the sale of a horse. In case of a sale "with all faults," the contract is not avoided by any misrepresentation *ignorantly* made by the vendor. Otherwise, if he state what he knows or believes to be false. But this expression does not constitute a warranty against such faults as are consistent with the thing's being what it is described to be.(5)

16. The distinction has been taken between express warranty and mere affirmation, that where an animal sold is *warranted* sound, no knowledge of unsoundness on the part of the vendor is necessary to charge him. Otherwise, if there is a mere *representation*, or a warranty "as far as he knows."(6)

17. Where the vendor refers to any document, or to his belief only, no action is maintainable, without proof that he knew he was representing a falsehood. Thus if the vendor of a horse refer for his age to a written pedigree, and also state that

(1) *West v. Anderson*, 9 Conn. 107.

(2) *Mellish v. Motteaux*, Peake, 115.

(3) *Baglehole v. Walters*, 3 Camp. 154—8.

(4) *Pickering v. Dowson*, 4 Taun. 784.

(5) Long, (Am. Ed.) 207, 8.

(6) *Case v. Boughton*, 11 Wend. 106.

* The vendor of a horse is liable for concealing any defect in him, which he knows, though he use no art. *McCavock v. Ward*, Cooke, 403.

he knows nothing about it except from this source; he is not liable, though the pedigree prove untrue. But if he knew it to be untrue, he would be liable, although he had expressly declared that he would not warrant it to be true.(1)

18. Where there is a bill of sale, or a written agreement respecting a sale, no action can be maintained upon a mere parol warranty.(2)*

19. Bill of sale of a ship. In an action by the vendee against the vendor, the plaintiff offered evidence that the defendant, after execution, and before delivery of the bill of sale, in reply to a question put by the plaintiff, said, in substance, that the ship was completely copper-fastened; also that the defendant advertised her as *composition fastened*, complete for coppering. Held, this evidence was not admissible, to support the allegation of a parol warranty. The advertisement might have been evidence in an action for *deceit*.(3)

20. It is said, there is an implied warranty, that the thing sold is *in specie* that, as which it is purchased.(4) That words of description constitute a warranty that the thing sold is of the kind and quality described.(5) And if a misdescription, although not made fraudulently, is so far material, that it probably constituted the inducement to purchase in the mind of the vendee; it avoids the contract.(6) The following cases illustrate the distinctions which have been made upon this subject. It will be seen, that the above general principles have been adopted with much qualification.

21. The defendant agreed in writing to ship the plaintiff a quantity of "good fine wine;" acknowledging the receipt of

(1) Peake on Evi. 228. *Dunlop v. Waugh*, Peake, 123. *Wood v. Smith*, 5 M. & R. 124.

(2) *Mumford v. M'Pherson*, 1 John. 414. *Wilson v. Marsh*, lb. 503.

(3) *Mumford v. M'Pherson*, 1 John. 414.

(4) *Borrekens v. Bevan*, 3 Rawle, 23.

(5) *Hogins v. Plympton*, 11 Pick. 100.

(6) *Flight v. Booth*, 1 Bing. N. C. 376.

* A vendee by written instrument may offer parol evidence of prior misrepresentations to prove fraud; as that the seller by fraud prevented him from discovering a defect which the seller knew to exist. Long, 209.

payment therefor. Held, this instrument did not constitute a warranty that the wine was of any particular quality, being too indefinite in its terms, and not itself the contract of sale, but recognizing a prior sale; and that the defendant might prove by parol evidence what were the terms of such sale, and the plaintiff's own selection of the wine.(1)*

22. The defendant sold certain wood to the plaintiff, who also purchased it of him, as *brazilletto*. A fair price was paid for wood of this description; but the article sold proved to be of a different quality and of little or no value. The agent of the plaintiff saw the wood when it was unloaded and delivered, and did not know or discover that it differed from the description in the bill of parcels; nor did the defendant, who was a mere consignee, know of the difference. Held, the plaintiff could not maintain an action as upon a warranty.(2)

23. Sale of a jewel, affirming it to be a *bezoar* stone, when in fact it was not. No action lies against the vendor, unless the declaration allege, either that the defendant knew this fact, or warranted the stone.(3)†

24. The defendant sold to the plaintiff certain paints for good Spanish brown and white lead, and for a full price. The paints proved to be bad and of no value; but the kegs had never been opened since the defendant purchased them. Held, the defendant was not liable to an action.(4)

25. The plaintiff sold to the defendant an article which was invoiced, advertised and purchased as *barilla* and the sample exhibited corresponded with the bulk. The defendant used it in the manufacture of soap, and then ascertained that it was not *barilla*, but *kelp*, an article resembling *barilla*, but of little or no

(1) *Hogins v. Plympton*, 11 Pick. 97.

(2) *Seixas v. Woods*, 2 Caines, 48.

(3) *Chandeler v. Lopus*, Cro. Jac. 4.

(4) *Holden v. Dakin*, 4 John. 421.

* Sale of turnip-seed, warranting it to be "good, white, round turnip-seed," which the seller could warrant. Held, a binding warranty. *Wood v. Smith*, 5 M. & R. 124. Goods were entered in an invoice as "scarlet cuttings." Held, they must conform to this known mercantile description. *Bridge v. Wain*, 1 Star. 504.

† The case of the *bezoar stone*, is perhaps not law now in England, certainly not in this country. *Bradford v. Manly*, 13 Mass. 139.

value. The vendee offered to pay for such part as he had used and return the remainder. In a suit brought by the vendor for the price, held, there was no warranty but a mere expression of opinion, and the action would not lie.(1)

26. The defendant gave to the plaintiff the following writing ; " sold A 2000 gallons prime quality winter oil." A bill of parcels was also given subsequently. Held, the contract of sale was effected by the former instrument ; that even if the terms were merely terms of description, they constituted a material part of the contract and a warranty, if so intended ; and that a declaration, alleging that the defendant undertook to sell " a good and superior quality, to wit, prime quality winter oil," was no variance from the agreement proved.(2)

27. If a horse is sold without warranty and without inquiry by the purchaser ; unsoundness, restiveness or unfitness for use, is no ground of action against the vendor ; because the law presumes that a proportionally low price was paid. But if the vendee apply for a *carriage-horse*, or one *fit to carry a lady*, or a timid and feeble rider ; the seller, who knows the qualities of the horse, impliedly warrants that the animal is suitable for these purposes.(3)

28. Printing the name of a painter opposite that of a picture in a catalogue does not constitute a warranty that the picture was painted by this artist.(4)

SECTION III.—WHAT IS A BREACH OF WARRANTY.

1. Sale of a negro, with warranty that she was born a slave, and against all who should claim her as such. Held, a claim to freedom under the laws of another state, relating to the importation of slaves, was no breach of warranty.(5)

2. Where a slave is warranted sound, and is proved to be

(1) Sweet v. Colgate, 20 John. 196.

(2) Hastings v. Lovering, 2 Pick. 214.

(3) Long (Am. Ed.) 205, 6.

(4) Jendwine v. Slade, 2 Esp. 572.

(5) Davis v. Sanford, Lit. Sel. C. 207.

sound at the sale, but unsound at delivery, this is no breach of warranty.(1)

3. A person employed to sell two horses, belonging to two different persons A and B, sold them at an entire price, with warranty. Held, the warranty of each must be regarded as several, and hence the vendee could not maintain *assumpsit* against A for the unsoundness of his (A's) horse, declaring as upon the sale of one only. If the other horse had been unsound, this would have been a breach of warranty; but there would have been no pretence for charging A.(2)

4. Where a horse is warranted sound, any slight disorder, not likely to affect his permanent value, and from which he recovers, is no breach of such warranty; as for instance, a cold, which may be cured with ordinary care, so as not to be liable to return. A horse, under such circumstances, is no more unsound than a man would be. So a horse could not be called *lame*, if he merely had a thorn in his foot, upon the extraction of which he would no longer limp. But any disease, though as yet in its early stage, which is permanently injurious to the constitution, and of a nature to render probable future attacks of the same kind, is a breach of such warranty. If a horse be warranted perfect, and want either a tail or an ear, the vendor is not liable, unless the vendee is blind; because the defect is one plainly obvious to the senses.* But if a horse be warranted sound, and want the sight of an eye, the vendor is liable, because the discernment of such defect is often a matter of skill. So if a horse having a visible *splint* is sold with warranty, the vendor is liable in case he becomes subsequently lame from this cause.(3)†

(1) Price v. Barr, Lit. Sel. C. 217.

(2) Symonds v. Carr, 1 Camp. 361.

(3) Bolden v. Brogden, 2 Moo. & R. 113. 3 Bl. Comm. 165. Butterfield v. Burroughs, 1 Salk. 211. Margetson v. Wright, 5 M. & P. 606. 7 Bing. 603, 8. 457. 1 M. & S. 622.

* But a vendor of cloth will be liable upon a warranty that it is of a certain length; for the length can be ascertained only by measurement.

† The doctrine stated by Blackstone (3 Comm. 166) that a warranty cannot extend to things *in futuro*, as, e. g. the future soundness of a horse, seems to be unfound-

5. Declaration upon a contract for selling to the defendant "a certain cargo of good merchantable Gallipoli oil, then being the cargo of the vessel F, the said cargo consisting of L K 240 casks containing 901 *salines* and 9 *pignatelles* at £54 per imperial ton." The defendant pleaded, that the casks containing the oil for which the plaintiff declared, were not well seasoned and proper to contain good merchantable Gallipoli oil, according to the terms and within the true intent of the agreement declared on, but were badly seasoned, and unfit and improper to contain oil. Held a bad plea. The subject matter of the contract was the oil, not the casks. The condition of the latter went only to a part of the consideration. No other defence could be made to the action, than by proving the oil furnished to be not good, merchantable, Gallipoli oil. If it were otherwise, a defect in a single cask, or even the slightest defect would be sufficient to defeat the action. The case would be different, if the article itself were rendered unmerchantable by the bad condition of the vessel containing it, as for instance in the case of wine badly corked; but then the declaration must specifically allege the injurious consequences. This plea takes issue on what is merely a description in part of the thing contracted for. The contents were not merely *accessory* to the casks, but on the contrary, the latter formed no part of the contract, and were not the subject of warranty. Even if all the

ed in principle, and has been distinctly overruled. Doug. 735. 2 Bing. 183. Long, 203.

Very nice questions often arise as to what constitutes unsoundness in a horse. The habit of *roaring* was formerly held not to render a horse unsound. But a contrary doctrine was held in a later case, upon the testimony of a skilful person, that this habit is produced by a narrowness of the windpipe, and frequently by sore throat or inflammation, and unfits the animal for rapid motion. *Crib-biting* is not unsoundness. A cough is, if permanent. So *the strangle* or *mont du chien*. So *a bone spavin in the hock*. So a *nerved* horse is unsound. A *splint* is not one of those patent defects which are excluded from the warranty of soundness, because it may or may not produce lameness. Any infirmity which renders the animal less fit for present service, has been held to be unsoundness. *Bassett v. Collis*, 2 Camp. 523. *Onslow v. Eames*, 2 Stark. 81. *Broennenburgh v. Haycock*, Holt, 630. *Dickenson v. Fallett*, 2 M. & R. 299. *Margetson v. Wright*, 8 Bing. 454. *Shillitoe v. Claridge*, 2 Chit. 425. *Brown*, 311. *Watson v. Denton*, 7 C. & P. 85. *Best v. Osborne, R. & M.* 290. *Elton v. Brogden*, 4 Camp. 281.

casks were defective, and a small leakage from each, but no deterioration of the bulk, this would only go to a part of the consideration. The case is like a sale of bales of cotton, where the bales merely prove to be unsound.(1)

SECTION IV.—SALE BY SAMPLE.

1. A sale *by sample* implies a warranty that the bulk shall correspond with the sample.(2)

2. A sale by sample implies warranty, though the vendee require the vendor to test its correctness by procuring a second sample.(3)

3. Whether the production of a sample is a warranty that the bulk corresponds therewith, or whether the sample is shown to enable the vendee to judge of the quality of the article, the vendor is bound either that the article shall equal the sample exhibited, or be saleable and of the description contracted for.(4)

4. Where goods are sold by sample for a certain price, and goods of an inferior quality furnished, the vendor can recover only the real value of them.(5)

5. The words *per sample* in a sale note, are no part of the description of the thing sold, but a mere collateral agreement that it is of a certain quality, the breach of which is matter of defence to an action by the vendor. The words are equivalent to a warranty, that the article conforms to a small parcel which is exhibited. Hence, in an action for the price, they need not be set forth in the declaration.(6)

6. A vendor is not exempted from his liability upon a war-

(1) Gower v. Von Dadelszen, 4 Scott, 453.

(2) Oneida, &c. v. Lawrence, 4 Cow. 440. Andrews v. Kneeland, 6 Cow. 354. Sands v. Taylor, 5 John. 404.

(3) Gallagher v. Waring, 9 Wend. 20.

(4) Oneida, &c. v. Lawrence, 4 Cow. 440.

(5) Germaine v. Burton, 3 Stark. 32.

(6) (Parker v. Palmer, 4 B. & A. 386, qu.)

ranty, implied from the exhibition of a sample, by the fact that he is a mere agent, and generally known as a commission merchant. To set up this defence, he ought to disclose the name of his principal.(1)

7. An agent or broker, with power to sell and no express restriction as to the mode, may sell by sample or with warranty, whether the principal reside abroad or in the same city. The latter is presumed to know the condition of the goods, and bound to send a fair sample. If the property is so situated that it cannot be seen in bulk, the broker is allowed to sell by sample for the convenience of trade, although this mode be not conformable to general usage.(2)

8. In the case of *Waring v. Mason*,(3) Senator Mack expressed the opinion, that the doctrine of warranty by the exhibition of a sample is not applicable to the sale and re-sale of products or manufactured articles through consignees and commission merchants; that in the absence of fraud, the rule ought not to apply to them so strictly, as to the grower or manufacturer of the article sold. To the same purpose Senator Paige remarked, if an article is purchased from the manufacturer, the law implies an undertaking similar to that of a mechanic who contracts to do work; viz., that the thing shall be made skilfully or in a workmanlike manner. He adds, that in case of a purchase or agreement to purchase without opportunity of inspection, as where the buyer is at a distance from the place of contract; the agreement may be considered as executory, and if the thing does not correspond with the representation made by the vendor, the purchaser is not bound to receive it. But, it seems, in all cases, where the vendee has opportunity of inspection, and there is no fraud or warranty, although a sample is exhibited, the maxim *caveat emptor* applies. To this rule the sale of *cotton* is not an exception. Warranty by sample is an innovation upon the common law. Senator Paige proceeds to examine the numerous and somewhat conflicting decisions upon this subject, and deduces a result favorable to his own doctrine above-stated.

(1) *Waring v. Mason*, 18 Wend. 425.

(2) *Andrews v. Kneeland*, 6 Cow. 354.

(3) 18 Wend. 436.

9. Parol evidence is admissible of a sale by sample, though the broker through whom such sale was effected entered it in his books without mentioning it as such; it not being signed by the broker, nor any *bought and sold note* delivered by him to either party.(1)

10. But where goods are sold by a written contract, which describes their quality, without reference to a sample; in a suit for not accepting or paying for the goods, the vendor will not be permitted to prove that they corresponded with a sample exhibited at the time to the vendee, who was a skilful person.(2)

11. So, where, at or after a sale of goods, a specimen is exhibited to the purchaser, but the written agreement of sale describes them as of a particular denomination; this is not a sale *by sample*, but involves an implied warranty that the goods are merchantable and of the denomination mentioned.(3)

12. In case of a sale by sample, to which the goods do not conform, the vendee is not bound to accept and pay for them, though the vendor is willing to allow the difference of value, and though under such circumstances there is a prevailing usage for the vendee to accept and pay for the goods.(4)

13. Sale of sugars at auction, by sample. On examination, the bulk was found different in color from the sample, and less valuable. The seller nevertheless required the vendee to accept the sugars, upon the ground of a usage, which was proved, for purchasers to receive an article sold by sample, notwithstanding its inferiority, if there were no fraud, upon an appraisal by sworn brokers. The sale took place in April. The sugars had been landed in the West India docks in the November preceding, at which time the samples were taken. By subsequent exposure to the air, the samples had grown whiter, which change rendered them more valuable for the retail trade, though not for the sugar baker. A purchaser at auction has no means of knowing at what time samples have been drawn, being in-

(1) *Waring v. Mason*, 18 Wend. 425.

(2) *Tye v. Finmore*, 3 Camp. 462.

(3) *Gardinor v. Gray*, 4 Camp. 144.

(4) *Hibbert v. Shree*, 1 Camp. 115.

formed merely that the sugars lie in the docks. Held, under these circumstances, no action could be maintained for the price.(1)

14. Where goods sold are inferior to the sample which was exhibited to the purchaser, the latter cannot rely upon such inferiority, without returning the goods.(2)

15. The defendant agreed to purchase of the plaintiff a quantity of wheat. *The bought note* states, that "the corn is sold according to a sample, and to be paid for in bankers' bills, if required." It was the usage of the market to sell by sample, subject to the purchaser's inspection and approval of the bulk of the property. A week after the contract was made, the defendant applied to see the bulk. The plaintiff replied, that he would either send for a bushel on the spot, or send him a load the next day for inspection, but declined showing the bulk, because it was in another warehouse, and he did not like to *let him into his connexions*. Four days afterwards, the plaintiff informed the defendant that the wheat was ready for him on production of the bankers' bills. The price of wheat having in the mean time fallen, the defendant repudiated the contract. In an action against him for not taking the wheat, held, the defendant had a right to inspect the whole quantity at any proper and convenient time after the contract, and as the plaintiff did not allow such inspection, this action could not be sustained.(3)

16. The defendant called upon the plaintiff at his store, with a sample of cloves in a paper, and asked him if he wished to purchase the article. A witness, who was present, examined the sample and found it to be of the best Cayenne cloves. The defendant subsequently said, that it was a sample of *fair* cloves. A bill of parcels was given, of *cloves*, generally, and the same day the casks of cloves purchased were removed to the store of the plaintiff. The price was that of the best quality of cloves. The sample exhibited was not taken from the casks, but out of an open barrel, from which the casks, not being full, were filled

(1) *Hibbert v. Shee*, 1 Camp. 113.

(2) *Grimaldi v. White*, 4 Esp. 95.

(3) *Lorimer v. Smith*, 2 D. & R. 23.

up; but the defendant did not know this fact. Immediately after the sale the market price fell, and the plaintiff made no attempt to sell the cloves. Sixteen months afterwards, on an application to purchase, he opened the casks, which proved to contain a mixture, to the amount of one third, of a kind of cloves worth one fifth or one fourth less than those exhibited. Thereupon he offered to return them to the defendant. Held, the bill of parcels was designed merely to show a purchase and payment of the price; that it was not the only legal evidence of the contract, being usually general in form and not descriptive of the whole agreement, and in this instance presenting a case of *latent ambiguity*; that the exhibition of a sample was designed to save the necessity of examining the whole bulk of the property, and amounted to a warranty that the bulk was of the same kind and essentially the same quality, and perhaps equally sound and good. In this case, the ground of complaint was not any *deterioration*, but a *specific difference* in the plants; as if *tea* should be sold in this way, and the bulk prove to be *souchong*, while the sample was *hyson*. The exhibition of a sample must in all fair dealing stand in lieu of a warranty or affirmation. It is a silent, symbolical warranty, perfectly understood, and used for the convenience of trade. That there is not some unknown and invisible defect, arising from natural causes or previous management by some former dealer, the seller may not be presumed to affirm. But he does affirm, that it is the same, generically, and specifically, with the sample exhibited.(1)

17. A case was sold with its contents, and described in the bill of parcels as "one seroon of indigo." At the time of sale, the vendee drew out from a hole in the side specimens for examination. The greater part of the contents was a different substance from indigo, and the rest of an inferior quality.* Held, this was a sale by sample, and the vendee might maintain assumpsit against the vendor on the above grounds.(2)

(1) *Bradford v. Manly*, 13 Mass. 139.

(2) *Williams v. Spafford*, 8 Pick. 250.

* The contents resembled *burnt clay*, colored like indigo, and at the end of the seroon were from seven to ten large pieces of leather and bones.

18. The following somewhat conflicting principles have been laid down and cases decided, in relation to sales of *cotton*.

19. In case of a sale by sample of cotton in bales, there is an implied warranty that the bulk corresponds with the sample. But the mere exhibition of a sample is not sufficient to constitute a warranty. It is a question for the jury, whether such was the intent of the parties (1)

20. Every sale of packed cotton is, by usage, a sale *by sample*, and *per se* a warranty. The vendee has the power of examining this article only externally and superficially, and the interior only to a small extent. The instruments with which samples are taken are in general from eight to twelve inches long, and the samples taken from about four inches. Any damage to the bulk could not be discovered without opening the bales, and this must be done with great expense and trouble. Hence the rule of *caveat emptor* does not apply.(2)

21. Declaration, upon a warranty of cotton, that it was warranted to be "good, merchantable cotton, free from dirt and all filthy matter." The plaintiff offered evidence, that the defendant produced a sample of good, merchantable cotton, free from dirt, &c." as alleged; and stated that it was "good, upland cotton, and that the sample was true," or that it was "prime upland, Georgia cotton." Held, no variance.(3)

22. Cotton was sold by bill as "Georgia upland." Samples were presented, with the declaration that they were drawn from the bales in the warehouse of the vendor, that they were "good upland cotton," and true samples. The vendee had no opportunity to inspect the cotton. The bulk having proved foul and damaged, being packed with a mixture of water, stained and in part rotted; held, the vendor was liable for breach of an implied warranty as to the quality.(4)

23. A sale by sample, with a warranty that the bulk conforms

(1) *Oneida, &c. v. Lawrence*, 4 Cow. 440. *Rose v. Beatie*, 2 Nott & M'C. 538. *Waring v. Mason*, 18 Wend. 425.

(2) *Boorman v. Jenkins*, 12 Wend. 566.

(3) *Oneida, &c. v. Lawrence*, 4 Cow. 440.

(4) *Id.*

thereto, is no warranty of the quality of the bulk, any farther than that it conforms to the sample.

24. Sale of hops by sample, with a warranty that the bulk corresponded with the sample. Held, this did not imply a warranty even that the hops were merchantable, although a merchantable price was paid. In case of a latent defect, unknown to the vendor, and no fraud, he is not liable, although the article be unmerchantable. It was well known in the trade, that such a defect might exist, and therefore the vendee should have claimed an express warranty. Instead of which, a sample was taken from the bulk, and he exercised his own judgment upon the quality.(1)

25. A similar doctrine was settled in the following case.

26. The plaintiff, proposing to sell the defendant a quantity of Southern wheat, for the purpose of examination, run his arm down into the bulk, and took out a sample, according to the usual mode of purchase. The sample did not differ from the bulk, in any other respect, than that the latter, like all Southern wheat, had become heated, and thus lost its vegetative quality and its power of *malting*. Held, in an action for the price of the wheat, that there was no warranty against the defect above-mentioned, and therefore no defence to the action. The defendant must be presumed to have known the nature and condition of the wheat. He examined it for himself, and therefore the sale was not strictly by sample. Perhaps if the bulk of the article had been unfit for the usual purpose to which wheat is applied, or unmerchantable, or manifestly inferior to or different from the sample, the defendant would not be bound to receive and pay for it. But, the jury having found it to be merchantable, he could not allege to the contrary.(2)

27. In private transactions, sale *by sample* raises an implied warranty. But there is no warranty in judicial sales, or in sales at auction, made in the usual mode. Thus, in case of sale by the marshal under an order of Court, or by an auctioneer under

(1) *Parkinson v. Lee*, 2 E. 314.

(2) *Sands v. Taylor*, 5 John. 395.

the marshal, neither of these parties can enter into a warranty.(1)

SECTION V.—SALE OF PROVISIONS.

1. The case of *provisions* seems to constitute an exception to the general rule against any implied warranty of the quality of goods sold.*

2. In the case of *Wright v. Hart*,(2) Senator Maison expressed the opinion, that the law makes an exception to the general rule *caveat emptor* in the sale of provisions, from a regard to health and life, even though the vendee has had opportunity for examination; unless the defect is palpable, or the vendee has notice of it, or the vendor knows that the thing is designed for other uses than food. In the same case, Senator Tracy expresses himself in strong language with regard to the departures from the common law of modern cases upon this subject.(3)

3. In the month of January, the defendant sold to the plaintiff for eight dollars per barrel, which was a *sound price*, and for the purpose of exportation, a quantity of beef as *good cargo beef*, marked and branded with the name of A, the inspector, according to law. When exposed for sale in the West Indies in the following April, the beef proved to be tainted and unsaleable, while other beef in the same cargo was sweet and good. It appeared that this condition of the beef resulted from pouring in the pickle when warm, which was an unusual practice. Held, the defendant was liable to an action; that the object of the law, in requiring beef to be sorted, salted and packed for exportation, was, to raise its credit, increase the demand, and pre-

(1) The Monte Allegre, 9 Wheat. 616.

(2) 18 Wend. 449.

(3) 12 John. 468.

* It is stated by Blackstone, that in contracts for provisions it is always implied that they are wholesome. 3 Comm. 164.

serve health; and therefore the law furnished no justification for doing these acts improperly. (1)

4. A sold to B twenty-five barrels of beef, branded according to law, "Falmouth, Mass., Cargo No. 3 beef, S. Bird, D. Insp." The price was \$6 per barrel, the current price of good and wholesome beef. A resided at Boston, B at Bath, Maine. B afterwards sent abroad four of the barrels, not knowing their quality. By the accidental bursting of a barrel in lading, and upon subsequent examination, it was discovered, that twenty one of the barrels did not contain a sufficiency of pickle and salt, that they were not packed according to the brand, and were unwholesome and unfit for use; of all which B immediately gave notice to A. The four barrels sent abroad, at the price of \$16 per barrel, were returned to B, and an entire loss. A was merely an agent for the owner of the beef, and ignorant of its quality, but he did not notify B of his being an agent. The bill was made out in his (A's) name, the note was made payable to him, and up to the time of trial B was still ignorant who was the principal. In an action brought by B against A upon these facts, held, it could not be sustained. Upon the general subject of the sale of *provisions*, the Court remarked, that it is not *implied* that provisions are wholesome, but often the *contrary*. The rule applies to these as well as other articles, that a vendee cannot have a remedy equivalent to that upon an express warranty, unless there have been some *artifice*. And this is sufficiently proved, where a victualler sells meat as fresh to his customers at a sound price, which is stale and defective, or unwholesome from the state in which the animal died. The offer to sell is a representation of soundness, unless the contrary be expressed; and knowledge is presumed from the seller's being engaged in the trade. The action for deceit lies, only where there has been an affirmation wilfully false, or some artifice is proved or taken to be proved, either directly, or by necessary presumption from the circumstances and nature of the contract, and the situation of the parties. In the present case, with respect to the kind, quality, state and quantity of the beef, the vendor undertook to

(1) Bailey v. Nichols, 2 Root, 407.

have full faith in the brand, and represented, that for any thing he knew, the brand was truly applied, and there had been no change in the article. But, as knowledge on his part was expressly negatived, the action could not be sustained.(1)

5. So, it is held by an ancient authority, that if I have an article which is defective, *whether victuals or any thing else*, and, knowing it to be defective I sell it as sound, and so represent or affirm; an action for deceit will lie. But although the thing be defective, if the defect is unknown, though I represent or affirm it to be sound, no action lies, unless there be a warranty. And it has been decided in Kentucky, that the law implies a warranty of the soundness of provisions, only where they are sold for consumption, not for merchandize.(2)

6. In an action on the case for knowingly selling to the plaintiff unwholesome meat, as and for good and wholesome meat, the declaration need not allege, that the plaintiff had paid for the meat, nor any special damage.(3)

7. The plaintiff declared against the defendant, that the latter sold him a quarter of beef as good and sound; that it was not good and sound, but bad and unwholesome. It was proved, that the animal ate shortly before it was slaughtered, many peas and oats, and was killed to prevent its dying in consequence of eating them; and that persons who ate of the beef were made very sick, and a servant of the plaintiff was sick two weeks. A verdict being returned for the plaintiff, it was held, that this settled the fact of the defendant's knowledge, and that the concealment of the unsoundness was equivalent to a suggestion of soundness.(4)*

(1) Emerson v. Brigham, 10 Mass. 197.

(2) Per Popham, Dyer, 75. Jones v. Murray, 3 Monr. 84.

(3) Peckham v. Holman, 11 Pick. 484.

(4) Van Bracklin v. Fonda, 12 John. 468.

* Upon the subject of this section, the following quaint statement of the law is found in an old reporter, mixed up, it is true, with much extraneous matter. "If a man sell victuals which is corrupt, without warranty, an action lies, because it is against the Commonwealth." Roswel v. Vaughan, Cro. Jac. 197. (See 9 Hen. 6, pl. 53. 7 Hen. 4, pl. 15. 11 Edw. 4, pl. 6.—And although the book of Assize, 42 Ass. pl. 8. was objected, where one took goods from another and sold them, and the owner retook them, that an action upon the case was brought in nature of deceit for this falsity in sale,

SECTION VI.—WHAT IS NECESSARY TO SUSTAIN A SUIT OR DEFENCE UPON A WARRANTY.

1. Where, in a sale, there is no warranty or fraud, though the vendee's reasonable and just expectations as to the quality of the goods be disappointed, still, if he receives them without objection, he is liable for the price.(1)

2. Where there is a sale with warranty, or by express agreement, the vendee is allowed to restore the thing sold; a mere offer to return is sufficient, though not accepted, to rescind the bargain. But if the sale is absolute, and followed by no agreement or assent of the vendor to take back the thing, the contract still remains open. In such case, the vendee's only remedy is a suit upon the warranty, unless it can be proved that the vendor knew of the unsoundness, and the former offered to return the article in reasonable time.(2)

3. In order to sustain an action upon a warranty, it is not necessary for the vendee to return or offer to return the article. Otherwise, where he disaffirms the contract, and sues to recover back the price.(3)

4. Where the vendor of slaves makes a fraudulent misrepre-

(1) *Goodhue v. Butman*, 8 Greenl. 116.

(2) *Thornton v. Wynn*, 12 Wheat. 183. *Rowley v. Bigelow*, 12 Pick. 307. *Seaver v. Dingley*, 4 Greenl. 306. *Hyatt v. Boyle*, 5 Gill. & J. 110.

(3) *Boorman v. Jenkins*, 12 Wend. 566. *Waring v. Mason*, 18 Wend. 425. *Franklin v. Long*, 7 Gill. & J. 407.

without any warranty; Tanfield thereto answered that the said book is not adjudged, but the party admits it and takes issue; yet if it were allowed to be law, it is because he there had possession by *tort*, and so had color in shew to be the owner; and he was deceived by buying of him who had only gained a tortious possession; and although he had not any right, yet every one took cognizance of him as owner, and he himself knew that he was not right owner; which is the reason that the action was maintainable: but here he had not any possession; and it is no more than if one should sell lands wherein another is in possession, or a horse, whereof another is possessed, without covenant or warranty for the enjoyment, it is at the peril of him who buys, and not reason he should have an action by the law, where he did not provide for himself. Wherefore it was adjudged for the defendant. Cro. Jac. 197.

sensation concerning them, and thereby induces the vendee to purchase, but the latter, after discovering the fraud, uses and disposes of part of the property, as his own; he cannot recover back the price from the vendor. Nor does it make any difference, that after thus using the property, the plaintiff discovered some *incidents* to the fraud before unknown.(1)

5. Where goods sold do not correspond with the order, the vendee must either return, or notify the vendor to take them, in order to maintain an action for their unfitness, or resist a suit for the price.(2)

6. The plaintiff contracted with the defendant for a quantity of beer, intending to export it to Gibraltar. The plaintiff discovered that the beer supplied was unfit for this purpose, in July, but neglected to notify the defendant till December, when it was too late for the defendant himself to export it. Held, the plaintiff could not maintain an action for the bad quality of the beer.(3)

7. Sale of goods with warranty, and a bill of exchange given for the price. The vendor knew of a defect in the goods, and the vendee tendered them back, but the vendor did not accept them. To an action on the bill, held, the breach of warranty was a good defence.(4)

8. The plaintiff and defendant entered into a contract by which the defendant was to deliver the plaintiff certain steers, the note of a third person, and a horse, and in return to receive a horse of the plaintiff and a note which the plaintiff held against him. The plaintiff represented his horse as sound; but it was unsound, and he knew the fact. The defendant agreed to pasture the steers for the plaintiff one week. Finding the horse unsound, the defendant returned it, refused to deliver the steers, and commenced an action against the plaintiff for selling an unsound horse. The present suit, being *trover* for the steers, was commenced before the above-named action. Held, the defendant might have treated the bargain as void on the

(1) *Campbell v. Fleming*, 1 Ad. & El. 40.

(2) *Fisher v. Samuda*, qu. 1 Camp. 190. *Groning v. Mendham*, 1 Stark. 257.

(3) *Ib.*

(4) *Lewis v. Cosgrave*, 2 Taun. 2. *Franklin v. Long*, 7 Gill. & J. 407.

ground of fraud, by returning the plaintiff's horse and his own note, or, if the latter were cancelled, the amount of it in money; and might then have maintained trover for his own horse and the note of the third person; and that the plaintiff would thus have lost all title to the steers. But the law would not allow the defendant to compel even a fraudulent seller to bring an action for his own property; and by commencing an action against the plaintiff, he treated the contract as still subsisting and would be entitled to recover damages for the breach of it. Judgment for the plaintiff.(1)

9. A horse sold was warranted sound and six years old, with condition that unless returned in two days, he should be considered sound. Held, this condition did not apply to the age of the horse; and that the buyer might return him ten days after the sale, on discovering that he was twelve years old.(2)

10. At an auction sale, the auctioneer declared it was to be on the usual condition; which conditions were printed and put up under the auctioneer's box. One of them was, that where there was a warranty of a horse sold, in case of any defect the horse must be returned before the evening of the second day after the sale. Held, this was sufficient notice to charge a purchaser, and deprive him of an action for breach of warranty, the horse not having been returned within the time stipulated.(3)

11. Though a vendee may set up a warranty in defence to a suit for the price, in mitigation of damages, yet the law does not require him so to do; and if he omits to take this course, he may afterwards bring an action upon the warranty.(4)

12. So, where a vendee with warranty pays a note given for the price, after notice of a breach of warranty; he may still, under some circumstances, recover damages for such breach.

13. Sale with warranty, and a note given for the price. The vendee paid the note after notice of a breach of warranty, but before ascertaining the amount of damage thereby sustained;

(1) *Kimball v. Cunningham*, 4 Mass. 502.

(2) *Buchanan v. Parnshaw*, 2 T. R. 745. See 3 Esp. 271.

(3) *Mesnard v. Aldridge*, 3 Esp. 271.

(4) *Cook v. Moseley*, 13 Wend. 277.

he having re-sold the article with warranty, and a claim having been made upon him by his vendee, though not yet substantiated. Held, the former vendee might sustain a suit on the warranty.(1)

14. The purchaser of a horse with warranty afterwards informed the seller that the horse was unsound, and the latter said, if it was so, he would take him back and return the price. Held, the vendee might still sue upon the warranty.(2)*

SECTION VII.—FORM OF ACTION AND MANNER OF PLEADING IN SUITS UPON WARRANTY AND FOR DECEIT.

1. In order to recover for a breach of warranty, the action must be expressly founded upon such breach; and not upon

(1) *Boorman v. Jenkins*, 12 Wend. 566.

(2) *Payne v. Whale*, 7 E. 274.

* It seems to have been doubted in some cases, whether, after acceptance of an article sold with warranty, the vendee has a right to return it and recover back the purchase money, or to resist an action for the price, upon the ground of a breach of warranty; unless this privilege was expressly reserved by the contract, or else the vendor was guilty of fraud. A distinction, not very intelligible, has been made, in this respect, between the purchase of *a specific chattel*; and an *executory contract*, by which the vendee orders goods of a certain quality from the manufacturer. It is to the latter of these two cases alone, that the principle above stated is held applicable. It would seem that the true question must be, whether the thing has been received and accepted, or whether the purchaser has had opportunity to examine it. He may treat the property as his, so far only as is necessary to give it a fair trial, without losing the right of returning it. But if the article, when returned, is in a worse state than it would have been if returned immediately upon discovery of the defect; the vendee cannot defend against an action for the price. Breach of warranty, it seems, may always be given in evidence in mitigation of damages, or, if the thing be of no value, in defence to the action. And an omission to return the article sold for an unreasonable length of time, though raising a strong presumption that it corresponded with the contract, will not be a bar to an action upon the warranty, if a breach is distinctly proved. 2 B. & A. 456. 3 Esp. 83. Stark. Evi. Pt. 4, p. 645. 1 Doug. 23, 24 n. 1 T. R. 133. 7 E. 274. 480, 1 n. 3 Camp. 299. 1 Star. R. 107. 1 Crompt. & M. 209. 2 Camp. 416. Long, 223, 4.

fraud. And allegations of fraud or warranty must be proved precisely as laid.(1)*

2. The action of deceit, or the action on the case for deceit, can be maintained only where there is an actual and intentional deception, and a loss or damage resulting from it.(2)

3. *Assumpsit* is the proper action upon an express or implied warranty. But if the action is founded on deceit or fraud, and not upon breach of contract, there must be an allegation of such deceit; otherwise no proof of it is admissible.(3)

4. The plaintiff and defendant having a conversation respecting certain obligations, the latter offered to transfer them, and, as an inducement for the plaintiff to buy, affirmed that they were good and collectable, and that the obligor was good and would pay them. The declaration alleges, that the plaintiff gave credit to these statements, bought and took a transfer of the obligations, and that to induce him to take such transfer, the defendant falsely and wickedly alleged, that the obligations and assignments were good and sufficient; that the defendant has not performed his said affirmation, promise and *assumpsit*, and the plaintiff avers that the defendant at the time well knew that the obligor was not good, &c. The declaration also contained a second count for money had and received. Held, there was a misjoinder of counts. As there was an assignment in writing, the law could not raise any parol implied warranty, but the action must rest wholly in deceit. Hence, *not guilty* was the proper plea to one count, while *non-assumpsit* must be pleaded to the other.(4)

5. A count, alleging a warranty made after the sale was complete, is bad after verdict, because it avers no consideration for the warranty, or a past consideration, viz. that the plaintiff *had*

(1) *Thompson v. Ashton*, 14 J. John. 316. *Snell v. Moses*, 1 J. John. 96. *Perry v. Aaron*, Ib. 129.

(2) *Emerson v. Brigham*, 10 Mass. 199, 200.

(3) *Evertson v. Miles*, 6 J. John. 138. *Rew v. Barber*, 3 Cow. 272.

(4) *Wilson v. Marsh*, 1 J. John. 503.

* In Pennsylvania, on a general allegation of misrepresentation and fraud, a party may be compelled to specify the evidence which is to prove the fraud. *Com. v. Breneman*, 1 Rawle, 311.

bought. A warranty must be made at the time of sale, and be a part of the contract.(1)

SECTION VIII.—EVIDENCE, IN CASE OF WARRANTY.

1. Where a vendor of goods makes representations amounting to a warranty, and the sale is afterwards consummated by a written and sealed transfer without warranty; in an action of *assumpsit* by the vendee, he cannot offer evidence of the previous representations, it being presumed that the writing contains all the terms of the bargain.(2)*

2. In case of sale with warranty, the warranty is an essential part of the contract and should be set out in the note or memorandum. Parol proof of the warranty is inadmissible, and the omission of it renders the contract void.(3)

3. But where the vendor of a negro gave a warranty in writing of his soundness; held, parol proof was admissible, that at the time of sale he informed the vendor of a defect.(4)

4. Where an agent sells in writing and warrants in his own name, he is personally bound, though the vendee had notice of his agency. To exempt him from personal liability, the fact should appear by the writing.(5)

5. Evidence is not admissible of a custom or usage, by which the mere sale of a particular article implies a warranty of its goodness. Thus a vendee of crockery ware was not allowed to prove a usage in New York, by which the exhibition of the invoices in sales of that article constitutes an undertaking that it

(1) Bloss v. Kittridge, 5 Verm. 28.

(2) Van Ostrand v. Reid, 1 Wend. 424.

(3) Peltier v. Collins, 3 Wend. 459.

(4) Schuyler v. Russ, 2 Caines, 202.

(5) Hastings v. Lovering, 2 Pick. 214.

* In order to entitle the seller of goods obtained by fraudulent representations to reclaim the goods, it is not necessary that the representation should have been made at the time of the sale, as in case of a warranty. Sever v. Dingley, 4 Green. 306.

is good and merchantable ; although there was some contradiction in the account given by the vendor, as to the place where, and the persons from whom, he obtained the property.(1)

6. A agreed to sell to B a quantity of prime bacon. B examined and weighed it, and paid for it by giving a bill of exchange at two months. Before maturity of the bill, B gave notice to A, that the bacon did not conform to the terms of the agreement. In a suit upon the warranty, A cannot be permitted to prove a usage, for purchasers to reject the article purchased at the time when it is examined.(2)

7. But, it being customary in the *pimento* trade for the vendor to declare when the article was sea-damaged ; held, a sale without such declaration raised an implied warranty that it was not sea-damaged.(3)

8. Where there is an adverse title to the thing sold, the vendee may recover against the vendor upon the implied warranty, without proving a recovery against himself by the true owner. The right of action and the period of limitation commences at the time of sale and delivery.(4)

9. Where a vendee has been evicted, in a suit against the vendee upon the implied warranty of title, he may show, as evidence of eviction, the record of a judgment against him by the true owner. And if he once notified the vendor of the commencement of that suit, this is sufficient, and the latter was bound to take notice of the subsequent proceedings. As where the vendor attended with a witness at one court, but a trial was not then had, and did not attend, having no notice, at the trial or at a subsequent term.(5)

10. Where a vendee knows of an adverse claimant to the property, and voluntarily pays the value to him, this payment is no defence to a suit by the vendor for the price. Otherwise, if the third person has recovered judgment in an action against the vendee. The case is analogous to that of *rent*. If A has occupied certain premises under B, he cannot defend against a

(1) *Thompson v. Ashton*, 14 John. 316.

(2) *Yeats v. Pim*, 2 Marsh. 141. 6 Taun. 446.

(3) *Jones v. Bowden*, 4 Taun. 847.

(4) *Payne v. Rodden*, 4 Bibb. 304.

(5) *Blasdale v. Babcock*, 1 John. 517.

suit for the rent by B, upon the ground that he has paid rent to C, and that B has no title. Otherwise if C has proved his title and recovered the rent from A. (1)

SECTION IX.—DAMAGES IN CASE OF WARRANTY.

1. In an action against the vendor of a horse, for false affirmation, the plaintiff cannot recover the expense of keeping, previous to an offer to return the horse. (2)

2. The plaintiff sold to the defendant several articles, and warranted them to be of a certain quality. Three notes were given by the vendee for the price, and two of them paid. In an action upon the third note, held, the defendant might show a breach of warranty as to one of the articles, either in bar of the action or mitigation of damages. The law would not authorize the construction, that the consideration of each article was rateably contained in each note, and therefore the plaintiff was entitled to recover upon each the proportional price of the article which proved good. (3)

SECTION X.—WARRANTY OF TITLE.

1. Where a vendor is in possession, there is an implied warranty of title. (4)*

(1) *Blasdale v. Babcock*, 1 John. 517.

(2) *West v. Anderson*, 9 Conn. 107.

(3) *Judd v. Dennison*, 10 Wend. 512.

(4) *Chism v. Woods*, Hardin, 531. *De Freeze v. Trumper*, 1 John. 274. *Heermance v. Vernoy*, 6 John. 5. *Swett v. Colgate*, 20. 196.

* The necessity of a vendor's *possession*, to raise such implied warranty, is perhaps founded upon a dictum of Lord Holt (*Medina v. Stoughton*, 1 Salk. 210) to the effect, that where a vendor is in possession *and affirms the thing to be his*, this is a warranty of title. But if not in possession, the rule *caveat emptor* applies. It seems, however, that an express affirmation is not necessary to render the vendor liable,

2. On the other hand, where a vendor is in possession of the thing sold, and delivers it to the vendee; possession is *prima facie* evidence of title, and if the vendee would avoid the sale upon the ground of title in another, the burden of proof is upon him.(1)

3. If one person purchase the goods of another from a third who has no authority to sell them, the former is a wrongdoer to the owner. But he may recover damages from the seller, though the seller did not undertake that he had the right to sell, or know that he had no such right. The principle is, that if one having the possession of property, which gives him the character of owner, affirm that he is the owner, and thereby induce another person to purchase it, when in fact he is not the owner, he subjects himself to an action. This principle is not founded upon *contract*, but upon the *falsehood* of the seller—his affirmation of what he does not know to be true, or does know to be false.(2)

4. A horse being seised upon execution, the sheriff conveyed it to the execution creditor, who ordered him to return it to the debtor, which was accordingly done. The debtor sold the horse to A, and A to B, both acting *bona fide* and without notice of the levy, and afterwards the sheriff took it from B, and sold it upon the execution. Held, B might maintain an action against A upon an implied warranty of title.(3)

5. Sale of goods on civil process by the auctioneer of a sheriff, who, in reference to some possible defect of title, desired the vendee to give him a written notice not to pay over the price to the execution creditor. Not receiving such notice, he paid it over. It did not appear that the creditor knew of any defect in the title. Held, notwithstanding this request, the vendee might still maintain an action against the vendor, on the implied pro-

(1) 5 Monr. 316.

(2) *Adamson v. Jarvis*, 4 Bing. 73. 1 Salk. 210.

(3) *Rew v. Barber*, 3 Cow. 272.

where he is in possession; and the other part of *Ld. Holt's* proposition has also been questioned, (per *Buller, J.*, 3 T. R. 57, 8) and is said not to be found in *Ld. Raymond's* report of the same case. (*Ld. Ray.* 593.) In *Mr. Metcalf's* notes to *Yelverton*, (21 b.) *affirmation of title* is said to be a sufficient warranty. Otherwise in the sale of real estate.

mise that a vendor does not know of an existing defect in the title of the thing sold; and that the damages must be not merely nominal, but the amount of injury suffered. An action for money had and received would not lie.(1)

6. At a sale on execution, the constable declared the property to belong to the debtor, and that he would sell it as the law directed. Held, this was no warranty of title.(2)

7. The plaintiff, an auctioneer, sold goods under the order of the defendant, who had no authority to dispose of them, and the true owner afterwards recovered their value from the plaintiff. The plaintiff declares against the defendant, in an action on the case, that the defendant was possessed of certain goods, and represented to the plaintiff that he had a right to sell them. That the plaintiff in consequence thereof, at the defendant's request, sold the goods at auction, and, after deducting the charges for his trouble, paid the balance of the proceeds to the defendant. That the defendant herein deceived the plaintiff, not being at the time of sale entitled to sell the goods, and the true owner afterwards recovered their value from the plaintiff, and the defendant refused to reimburse him. It was objected to this declaration, that it alleged merely a want of authority to sell *at the time of sale*, not at the time when the defendant claimed such authority. Held, the real ground of action was, that the defendant affirmed that he had power to sell the goods, and requested the plaintiff to do it, whereby the plaintiff was induced to sell them, when in fact the defendant had no power thus to authorize him. This was an injury to the plaintiff, and a benefit to the defendant. Hence, the plaintiff had a right of action, whether the affirmation were false or true. If the defendant had authority when he employed the plaintiff, and afterwards lost it, he was bound to inform the plaintiff accordingly, or at least not to take the proceeds of sale. The evidence showed that the defendant had no authority *at the time of sale*, and he showed none at the time when he affirmed that he had it. Hence the law presumed, that he *never* had authority. Held, the declaration, on these grounds, was good after verdict.(3)

(1) *Peto v. Blades*, 5 Taun. 657.

(2) *Morgan v. Fencher*, 1 Blac. 10.

(3) *Adamson v. Jarvis*, 4 Bing. 66.

CHAPTER X.

RESCINDING OF SALES.

SECTION I.—RESCINDING BY MUTUAL AGREEMENT OF PARTIES.

1. *General principles and decided cases.*
7. *Rescinding in connexion with the insolvency of the vendee, and stoppage in transitu.*
15. *Promise of the vendor to restore the consideration, whether a rescinding.*
17. *Rescinding in part, by parol.*
20. *Re-exchange—payment or delivery necessary.*

SECTION II.—RESCINDING BY THE VENDOR.

1. *Neglect of vendee to take the goods.*
2. *Disaffirmance for fraud or insolvency of the vendee.*
12. *Time of rescinding.*
13. *Resumption by the vendor as agent of the vendee.*
15. *Election of the vendor to rescind or the reverse.*
21. *What will justify non-delivery of goods sold.*

SECTION III.—RESCINDING BY THE VENDEE.

1. *Return of thing sold; for what causes, at what time, &c.*
13. *Rescinding by vendee, after a breach of contract to deliver by the vendor.*

15. *Breach of special agreement by the vendee is a rescinding.*
 13. *Mere offer to return.*
 14. *Rescinding must be for the whole.*

SECTION IV.—EFFECT OF THE RESCINDING OF A SALE:

SECTION I —RESCINDING BY MUTUAL AGREEMENT OF PARTIES.

1. A sale may be rescinded by consent of the vendor and vendee, before the rights of third persons intervene. (1)

2. Where there is a delivery of goods with the concurrence of all parties interested, an agreement by the parties to rescind puts an end to the contract. (2)

3. When a bargain is made, and all the parties consent to dissolve it, and other conditions are proposed, the new agreement destroys the former bargain. (3)

4. A sells to B several sheep in a market, without delivery. Afterwards, in the same market, this agreement was discharged, and a new one made, that B should drive the sheep home and depasture them till such a time, A paying him a weekly sum therefor; and that B might then have them by paying an agreed price. Before this time, A sold the sheep to the plaintiff, and afterwards B sold them to C, who replevied them from the plaintiff; and the defendant, a servant of C, aided in driving the sheep to C's grounds, where they were left. After demand of the defendant, the plaintiff brings trover against him. Held, the new agreement between A and B defeated the first sale, being made by mutual consent and upon new conditions; that the new agreement was no sale, and the property remained in A, and passed to the plaintiff from A. (4)*

(1) *Smith v. Field*, 5 T. R. 402.

(2) *Atkin v. Barwick*, 1 Str. 165.

(3) *Mires v. Solebay*, 2 Mod. 243.

(4) *Mires v. Solebay*, 2 Mod. 242.

* But it was further held, that the action did not lie, because 1. the sheep were in *custodiâ legis* at the time of the alleged conversion: 2. the defendant was acting as

5. But where an agreement to rescind is in its terms executory and conditional, and before completion of it new rights intervene, the title will not revert in the vendor.

6. The defendant, having sold goods to A by a bill of parcels, receipted, and taken A's negotiable note in payment, gave him a certificate that he held them for him on storage. Afterwards A offered to cancel the bargain, if the defendant would return the note, to which the latter assented. The note was at that time in a bank, having been discounted for the defendant. Some days afterwards, the defendant tendered A the note, and requested him to cancel the agreement. A had in the mean time assigned the goods to the plaintiffs, his creditors, giving them notice, however, of the conversation in relation to the cancelling. The plaintiffs bring trover against the defendant. Held, the original contract vested the property in A; that, being an executed agreement, it was not rescinded; and that there was no resale to the defendant, but at most a conditional agreement to convey. Hence the action was sustained.(1)

7. The rescinding of a sale by mutual consent generally occurs in connexion with the insolvency of the vendee, and leads to a consideration of the vendor's right of stopping *in transitu*. Upon this subject the following cases have been decided.

8. Goods were consigned by A to B. On arrival at the wharfinger's, B refused to take, and ordered his attorney to take measures for stopping them. The attorney accordingly notified the wharfinger not to deliver to B. Three days afterwards, A wrote to confirm this direction. The next day, the goods were seized upon an execution against B. Held, the contract was rescinded before such seizure, and that the arrival of the goods, and the order given by B in relation to them, had not terminated the *transitus*.(2)

9. A, residing at N in Devonshire, ordered goods from B at

(1) Chapman v. Searle, 3 Pick. 38.

(2) Bartram v. Farebrother, 4 Bing. 579.

a servant, and the act commanded to be done was not *an apparent wrong* or a *trespass*; 3. the defendant acted under legal process; 4. the verdict did not find a *conversion*, but only a demand and refusal

London, but gave no directions to have them sent by any particular vessel. They were forwarded to him by ship, by way of Exeter, and he was advised accordingly. Upon their arrival at Exeter, the goods were delivered to C a wharfinger, who received and booked them on A's account, paying the freight and charges. After arrival of the goods, A advised B, that having become involved he should not take them, and that they were still at Exeter. At this time, A had committed an act of bankruptcy, and afterwards became legally a bankrupt. B applied to C for the goods, tendering the freight and charges, and C promised not to part with them, till he should be sure of a safe delivery, but he afterwards delivered them to the assignees of A, though indemnified by B. Held, B had the right of stoppage *in transitu*, and might maintain *trover* against C. Chambre, J., doubted, whether the right can be exercised, when the vendor obtains possession, as in this case, not by his own diligence, but by casual information, or through the act of the vendee after bankruptcy; because, in the latter case, the vendee gives him a preference over other creditors. But this judge concurred with the rest of the Court, as the above distinction was a small one, and here was no fraud by the vendee.(1)

10. A, the plaintiff, sent goods to B by a carrier, according to B's order, but B, before their arrival, refused to take them, objecting to the quantity, the term of credit, the quality and price. After some correspondence between A and B, A agreed to sell the goods to C, a purchaser found by B. B becoming bankrupt, the defendants, his assignees, with notice of the above facts, urged him to include these goods in the assignment, but he declined doing it, saying "he would rather rob on the highway, for he had never accepted them." The defendants afterwards induced the carrier to deliver them the goods. The plaintiff brings *trover* and recovers.(2)

11. A, residing in the country, purchased goods of B on the 7th (or 17th) of April, which were duly sent to him and credited to B in his books. June 4, A became bankrupt, having previously, May 18th, sent the goods, without B's order or know-

(1) *Mills v. Ball*, 2 B. & P. 457.

(2) *Lovat v. Parsons*, Cowp. 61.

ledge, to C, for B's use. June 6, A informed B by letter of this fact, stating the embarrassment of his affairs, that he was unwilling to have the property applied to the use of his creditors, that he had not credited B with the goods, but they were subject to B's order in the hands of C. June 9, the plaintiffs became assignees of A. June 13, B received A's letter, and immediately assented to the return of the goods. In an action of trover by the plaintiffs against B, held, the sale was rescinded by the delivery to C, and the suit could not be maintained.(1)

12. Goods were consigned to A in London, but, before their arrival in the river, he became insolvent. At the solicitation of the captains, A gave a verbal order to his son to take the goods from the vessels, and store them at a wharf which he sometimes used for that purpose, his own warehouse being in the city. At the same time he declared that he should not take the property, but this declaration was not communicated either to the wharfingers or the vendor. The goods were accordingly unloaded and piled away. A becoming bankrupt, the consignor stopped them as *in transitu*, and A's assignees bring *trover* against the wharfingers. At the trial, the question left to the jury was, whether the wharfingers took possession for A as his agents. The Court subsequently decided, that the question left to the jury should have been, whether the wharfingers took possession for A *as owner*; or whether, supposing the wharfingers to be A's agents, they received the goods for his benefit, or merely to keep for the vendor. It was also held, that A's declaration against accepting the goods was properly admissible in evidence.(2)

13. A sold goods to B, who resided and traded in America, but had a place of business in London. On the 3d and 5th of May, the goods were delivered to C, B's clerk in London, for shipment to B; and were sent by C to the defendant, a packer, to be packed for this purpose. April 9th, B wrote to C, informing him of his (B's) insolvency, and ordering that any goods purchased should be returned. May 18th, C received this let-

(1) *Atkin v. Barwick*, Str. 165.

(2) *James v. Griffin*, 1 Tyrwh. & Gr. 449.

ter, and about 9 o'clock P. M. showed it to A, who said he was ready to receive back the goods. On that and the next day, the goods were attached as B's. Having demanded them from the defendant, A brings *trover* against him. Held, the sale was rescinded, and the action would lie.(1)*

14. A shipped goods from Newcastle to London to the order of B. Before arrival of the goods, B sent word to A that he was in failing circumstances, and would not claim the property when it should arrive. A replied, without particularly mentioning the goods, "if I find you an honest man, you shall have every indulgence from me;" and immediately proceeded to London, and applied for the goods, tendering the freight and charges, at the wharf of C, where they had arrived, being the usual landing for B's goods, and at which they usually remained till called for. C refused to deliver the goods, except on condition of A's paying him a general balance due from B for past wharfage. Held, these facts showed a rescinding of the contract before the goods reached their destination, and, as there was no proof of their not coming into the hands of C as A's property, C had no right to retain them against A, although by virtue of a usage he might have done it against B. C's only claim must be *under B*, but A's title was paramount to B's. C had a bare authority to receive the goods, dated before B was suspected of insolvency, and which could not avail against A's subsequent claim.(2)

15. Where a vendor receives property in part payment, with the agreement, that, unless the balance be paid, he may retain such property and also receive back the thing sold; a subsequent promise to restore the property is not conclusive against him of a rescinding of the bargain.

16. A purchased a horse from B, and delivered him a note

(1) *Salte v. Field*, 5 T. R. 211. See 6 T. R. 80. Cowp. 123. 2 E. 117

(2) *Richardson v. Goss*, 3 B. & P. 119.

* Another creditor of B, receiving the same information given to A, declined taking back the goods sold, under the belief that C had no authority to return them; and attached them in the packer's hands. Held, he thereby affirmed the sale, and could not claim the goods. *Smith v. Field*, 5 T. R. 402.

signed by C in part payment. It was agreed between the parties to the sale, that, unless A should within a certain time give security for the balance, he should restore the horse and B should become owner of the note. A did not give such security, but returned the horse and demanded the note. B declined delivering up the note at that time, but afterwards said that A might have it if he would come for it, but that he (B) should sue him for damages. A again demanded the note, B refused to give it up, and A brings *assumpsit* for the amount of it. Held, by the above contract, the note had become the property of B; that the subsequent agreement to re-deliver was without consideration, and therefore void as a promise, and not conclusive evidence of a rescinding of the bargain.(1)*

17. A sale may be rescinded *in part*, or in relation to some only of its terms; and such rescinding need not be in writing, though the original agreement is a written one.

18. A agreed in writing to purchase from B three hundred hogs of bacon, to be delivered at certain times and in specified quantities. A part having been delivered, A requested B not to press the delivery of the rest, the sale being then dull; to which B assented. Held, this was only a parol dispensation of performance in regard to the times of delivery, and therefore not invalid, either by the statute of frauds, or the rule excluding parol evidence to control written instruments; and therefore, that A was liable for not accepting the remainder of the property in a reasonable time after the above parol contract.(2)

19. So, where there is an agreement for the sale of goods, to be manufactured, and alterations or additions are afterwards provided for, it is not necessary that the latter should be separately agreed upon in writing. But, under some circumstan-

(1) *Larabee v. Ovit*, 4 Verm. 45.

(2) *Cuff v. Penn*, 1 M. & S. 21.

* It was further held, that the contract was not void as a *gambling* transaction. There was no deposit of the note; subject to any future casualty or event. A had possession of the horse, and might either use or sell him, while B, being out of possession, could do neither. Hence the contract was a fair one.

ces, the same acts are necessary to rescind, as to make, the bargain. Thus it has been held, that a *re-exchange* of personal property has all the qualities of a sale, to which payment or delivery is an essential circumstance. Without this, the transaction is a mere executory agreement and passes no property. (1)

20. A and B made an exchange of horses, the former receiving the horse of the latter. The same day, B, thinking himself cheated in the bargain, made complaint to A accordingly, and they thereupon agreed to rescind, upon B's giving A three bushels of wheat; but there was no re-delivery, and A sold B's horse to C. B was previously informed where possession of his horse was to be had, but made no attempt to obtain possession or to perform his own agreement for several weeks; whereas C took the horse a day or two after the bargain was rescinded. B, having tendered the wheat and demanded his horse from C, brings replevin against him. Held, the action did not lie. The re-exchange was not effectual, it seems, even between the parties themselves. It was not to put them *in statu quo*, because the wheat made a new ingredient in the contract. Hence delivery, at least on one side, was necessary. (2)

SECTION II.—RESCINDING BY THE VENDOR.

1. It is said, that if a buyer does not carry away the goods in reasonable time, the seller may charge him for storage, or bring an action against him for not removing them, if he is thereby injured; but that he cannot on this ground put an end to the contract and re-sell the goods to others. (3) But, in case of a sale in a market or shop, where it is unusual to give credit; if no credit be given nor delivery made, and the vendee go away without paying; the vendor may rescind the sale, and sell the

(1) *Hoadly v. Maclaine*, 4 M. & Scott, 340.

(2) *Hazard v. Hamlin*, 5 Watts, 201.

(3) *Greaves v. Ashlin*, 3 Camp 426.

goods anew. And it is further held, that if the contract is completed, but the vendee refuses to take and pay for the goods, the vendor may re-sell them, and call upon the other to make up the loss thereby sustained.(1)

2. In case of the sale of goods by a broker in London, to be paid for by a bill of exchange; the vendor, if he doubts the solvency of the vendee, may annul the contract in reasonable time; that is, so soon as he can inquire into the vendee's circumstances. Five days were held to be an unreasonable delay. The question turned upon usage.(2)

3. A having agreed to deliver goods to B, B afterwards made a composition with his creditors. Held, a sufficient defence to an action for non-delivery, if the plaintiff, B, was in such a situation that he would be unable to pay.(3)

4. If a vendor, in case of fraud, after full knowledge of material facts, affirms the sale, he cannot afterwards disaffirm and avoid it. Otherwise, if he affirms it before discovery of the fraud, or of its full extent and character. The fact of his bringing suits upon other and similar contracts is no estoppel. The question is for the jury.(4)

5. There is no case, where one party can rescind a sale so as to divest the property from the other, except where he discovers fraud in the agreement, and can restore what he has received in as good plight as it was originally.(5)

6. A vendor may rescind the sale for fraud, though the representations were made at a time previous to such sale, if it was founded upon this inducement. The case is different from that of a warranty, which must make part of the contract of sale.(6)*

(1) Long, 241. Brod. Sup. to Stair, 853—7. Maclean v. Dunn, 1 M. & P. 761.

(2) Hodgson v. Davies, 2 Camp. 530

(3) Reader v. Knatchbull, 5 T. R. 218 n.

(4) Mackinley v. McGregor, 3 Whart. 369.

(5) Allen v. Edgerton, 3 Verm. 445.

(6) Seaver v. Dingley, 4 Greenl. 306.

* So, where a vendor brings an action upon the vendee's bond given for the price, the defendant may offer evidence of the plaintiff's oral declarations prior to the written agreement, for the purpose of showing fraud. It would be otherwise with respect

7. It is said, that where goods are obtained by fraud, the vendor may treat the sale as a nullity, and reclaim them, though the term of credit has not expired; and even from a *bona fide* second purchaser without notice of the fraud.(1) (But see s. 10. See also chap. XI. s. 1.)

8. A vendor, after delivery, cannot rescind the sale on the ground of fraud, without proving deceptive assertions and false representations fraudulently made, to induce him to part with the property. The insolvency of the vendee, and immediate liability of the goods to attachment, though known to him and concealed from the vendor, furnish no sufficient cause to rescind. It seems, there must be an *indictable* fraud, or at least sufficient foundation for the action of *deceit*, and for the recovery of damages, in case the vendor should not rescind. It is certain that there must be all the evidence of fraud, which would be necessary to sustain an action against any third person, who had induced the vendor to give credit to the vendee.(2)

9. Where goods are obtained by fraudulent pretences, the vendee sells them to one having notice of the fraud, and the vendor replevies them from him; it is no defence to this suit, that the second purchaser has been summoned as trustee of the first, in an action still pending: because, if the plaintiff in replevin prevails, the party summoned as trustee may disclose the judgment against him, as a bar to his liability in the trustee process.(3)

10. Where goods are obtained by means of fraudulent representations of the vendee, and afterwards attached by a creditor of the latter, whose claim accrued after the sale; the vendor cannot maintain replevin against the attaching officer. If a part of the debt was incurred before, and a part after the sale, the attachment shall prevail over the vendor's claim, only to the

(1) *Seaver v. Dingley*, 4 Greenl. 306.

(2) *Cross v. Peters*, 1 Greenl. 378.

(3) *Seaver v. Dingley*, 4 Greenl. 306.

to *warranty*. Such declarations are immaterial, unless relied on by the vendee. But he is presumed to have relied on them, if the contrary be not shown. *Holbrook v. Burt*, 22 Pick. 546.

amount of the latter portion, and the costs. But, as the property is indivisible, the attachment is a bar to the replevin suit, *for the whole*; and, if the officer afterwards sells more than enough of the property, to satisfy that portion of the debt incurred after the sale, the plaintiff will have another remedy.(1)

11. In case of an exchange between A and B, if A elects to rescind, upon the ground of fraud on the part of B, he cannot maintain an action, merely by notifying B to come and receive back his goods; but must actually return them.(2)

12. In case of sale, with the privilege, allowed to the vendor, of rescinding within a certain time, if he does not rescind within that time, the sale is absolute. Thus, A mortgaged certain personal property to B, but retained possession of it, and afterwards made a second sale, for valuable consideration, accompanied by delivery, to C, who was ignorant of the mortgage. It was agreed that C should make payment, a part in six, the rest in nine months; and, if he should fail in making the first payment, when due, A was to have the right of taking back the property. After ten months, C died insolvent, and A, without permission from any one, took possession of the goods, and D, the defendant, a constable, afterwards seized them under a process against A. Held, B could not maintain trespass against D.(3)

13. Besides the right of rescinding the contract, the vendor may under some circumstances resume the ownership of the property sold, not under his own former title, but as agent for the vendee. This principle has been stated as follows.

14. After the property in goods sold has vested in the vendee by virtue of the contract and part-delivery, if he refuses to receive the remainder upon their being tendered, with notice that the vendor intends to sell them, in case of his default, and hold him responsible for the deficiency; the vendor has a right to abandon the property, or to dispose of it *bona fide*, as agent of the vendee, to the best advantage, by a sale at auction, and to call upon the vendee for the amount of difference between the

(1) Gilbert v. Hudson, 4 Greenl. 345.

(2) Norton v. Young, 3 Greenl. 30. Rutter v. Blake, 2 Har. & J. 353. Ellis v. Hamlen, 3 Taun. 52. Cash v. Giles, 3 C. & P. 407. Okell v. Smith, 1 Stark. 107.

(3) Patten v. Smith, 5 Conn. 196.

proceeds of sale and the price stipulated in the contract. The vendor becomes agent or trustee of the vendee, for managing the property; and must necessarily either abandon or sell it. The case is like that of abandonment of a vessel insured, which the insurer refuses to accept. The party in possession then becomes agent for the other, and by exercising the right to sell does not waive any claim upon the contract.(1)

15. The vendor's requesting the vendee to sell the goods on his (the vendor's) account, is a rescinding of the sale, and bars a suit for the price.

16. The vendee of goods refusing to accept them, the vendor requested him to sell them on his (the vendor's) account; to which the vendee assented, if he should be able to do it. Not having sold the goods, the vendor sues him for the price. Held, the above request was in law a waiver of the sale, and it was not to be left to the jury to inquire, whether the request was made under an ignorance of the law, and an impression that the plaintiff's remedy was gone.(2)

17. Where a vendee desires to rescind the sale, but the vendor refuses to do it, and sues for the price; this is conclusive against his right to bring *trover* afterwards for the goods.

18. A vendor of goods sued for the price of them, in the sheriff's court, by attachment, but the proceedings were stayed by injunction from Chancery. The vendee had previously desired to rescind the sale, but the vendor would not consent to do it, and, after notice of the vendee's bankruptcy, claimed the price. The vendor then brings *trover*. Held, the action would not lie. The only question was, whether the sale had been rescinded, and the facts conclusively showed it had not.(3)

19. After receiving a part of the consideration without objection, the vendor cannot rescind without some default in the vendee.

20. A contracted with B to work in a factory, in consideration of which B sold to him certain property. The contract

(1) *Sands v. Taylor*, 5 John. 395.

(2) *Gomery v. Bond*, 3 M. & S. 378.

(3) *Smith v. Field*, 5 T. R. 402.

continued to run, and the stipulated labor was performed by A, for several weeks. Held, B could not, after this, rescind the bargain and divest the property from A, more especially if the circumstances would not allow his being put *in statu quo*.(1)

21. In connexion with the right of a vendor to rescind the sale, may be considered the question, what circumstances will justify non-delivery of the goods.

22. The vendor of goods contracted to ship them at St. Petersburg on a certain day in particular vessels. The goods, while on board of lighters which were taking them to the ships, were seized by the Russian government, and the ships cut their cables and put to sea, to avoid an embargo. Held, these facts were no defence to an action for not delivering the goods.(2)

23. A contract was made in London, for the sale of tallow from a certain ship on her arrival, to be taken from the king's landing-scale; and, in case the property did not arrive on or before a given day, the contract to be void. The vessel containing the tallow was wrecked on the coast of Scotland, but the cargo was saved, and might have been forwarded by the appointed day; but the vendor disposed of it at the place where the shipwreck took place. The vendee did not offer indemnity for bringing the tallow to London. Held, he could not maintain an action for its non-delivery.(3)

SECTION III.—RESCINDING BY THE VENDEE.

1. Where one sells a different interest from that which he pretends, especially if the contract is founded in ignorance and fraud, the vendee may return the chattel to the vendor immediately after a discovery, and thus rescind the bargain; and, under these circumstances, no action will lie for the price. Thus the owner of a slave in New-York, by the laws of which there might

(1) Allen v. Edgerton, 3 Verm. 442.

(2) Splidt v. Health, 2 Camp. 57 n.

(3) Idle v. Thornton, 3 Camp. 274.

be a written but not a verbal manumission, having agreed in writing to manumit him at a certain time, deposited the agreement with a third person, and sold the slave absolutely, for his full value, without notice of the written agreement, although the vendee was informed that the slave had been promised his freedom in eight years. The vendor brings an action for the price of the slave. Held, it could not be sustained.(1) So where articles are ordered, of a certain quality or description, or for a particular purpose, and prove to vary essentially from the order; the vendee, after a reasonable time for inspection and trial, may return them, and recover back the price.(2)

2. Where there is a parol order for goods, which are delivered, subject to the vendee's approval, he is bound to take them, unless he refuse to accept in reasonable time, or unless the articles are unfit for use, in which case the order would not be complied with.(3)

3. It is said, when there is any objection to an article of sale, common justice and honesty require that it should be returned at the earliest period, and before it is so changed as to render it impossible to ascertain by proper tests, whether the article is of the quality agreed for.(4)

4. Where a vendee reserves the right to rescind the sale, if he shall be unable to sell the property or sick of his bargain; the question what is a reasonable time for rescinding is a question of law for the Court. Two months have been held to be more than a reasonable time.(5)

5. So, where goods delivered do not conform to the order given for them, the vendee is still bound to pay the stipulated price, if he fail to return them in reasonable time, and use them as his own. As where the plaintiff was to supply a complete chandelier, sufficient to light a certain room, and the defendant kept it, though wholly insufficient for this purpose, six months.(6)

6. The plaintiff purchased of the defendant a chaise and har-

(1) *Ketletas v. Fleet*, 7 John. 324.

(2) *Street v. Blay*, 2 B. & Ad. 460. *Gompertz v. Denton*, 1 Cr. & M. 207.

(3) *Coleman v. Gibson*, 1 Mood. & R. 168. 1 T. R. 136. 1 Camp. 190.

(4) Per Ld. Ellenborough, *Hopkins v. Appleby*, 1 Stark. 479.

(5) *Kingsley v. Wallis*, 2 Shepl. 57.

(6) *Milner v. Tucker*, 1 C. & P. 15.

ness, on condition that he might return them, in case his wife did not approve of them, paying a certain sum per day for their use. The wife not approving of the articles, the plaintiff returned them after three days, tendering the stipulated sum for the use of them; but the plaintiff refused to accept them or restore the price paid. Held, by the plaintiff's offer the contract was ended, and he might sue in money had and received for the price.(1)

7. The defendant ordered from the plaintiff a threshing-machine. The machine delivered was unfit for use, but the defendant kept it several years, though he used it only twice, and never notified the vendor to take it back. Held, this was a waiver of any objection to the quality, and the defendant was liable for the price.(2)

8. Where a vendee allows the article purchased to remain on his premises for two months without examination; its unfitness for use is no defence to a suit for the price, unless some deceit was practised; more especially if after the end of the two months he has promised payment.(3)

9. The plaintiff sold to the defendant a quantity of *barilla*, warranting it to be of a certain quality. The defendant used the *barilla* in eight successive boilings, consuming the whole quantity sold, and made no complaint in regard to it. Held, as it was no longer possible for the plaintiff to apply tests for the purpose of ascertaining the quality, the whole having been used, or to obtain the opinion of intelligent men, which he might have done, if the defendant had given him notice; the latter was bound to pay the stipulated price, notwithstanding any inferiority in the quality of the article.(4)

10. In June 1791, A agreed to sell B, for a certain price, all his cord wood. It was the custom, in such case, for the vendor to cut off the boughs and trunks, and cord the wood, then for the vendee to re-cord it, whereupon it became the property of the latter. A cut 60 cords, corded ten, and B re-corded half a

(1) *Somers v. Barrett*, 1 T. R. 133. See *Doug.* 23. 1 N. R. 351.

(2) *Cash v. Giles*, 3 C. & P. 407.

(3) *Percival v. Blake*, 2 C. & P. 514.

(4) *Hopkins v. Appleby*, 1 Stark. 477.

cord and measured the rest. In March 1792, a part of the price was paid, but A corded no more of the wood. B brings an action to recover back the money paid. Held, the acts of B did not amount to a part execution of the contract; that it had failed of complete fulfilment through the fault of A, and therefore the action was sustained.(1)

11. The plaintiff agreed with the defendant, to manufacture for him certain utensils of trade at a specified price, and that they should be sound and made of the best materials. The articles having been delivered, in an action for the price, the defendant contended that they were unfit for the intended use. Held, it was a question for the jury, whether the defendant had used them longer than was necessary to make a fair trial of their quality. If he had not, and if the utensils were unfit for the use proposed, the vendor, upon notice, would be bound to take them away, and they would remain at his risk. But if the vendee retain them, without notice to the vendor, he is liable for the value of the materials.(2)

12. An article sold by sample did not correspond with the sample exhibited. The vendee, after seeing fresh samples inferior in quality to that by which he purchased, put up the article for sale at an auction of the East India Company, as the vendor had agreed he might do, at a limited price. No bid being obtained for this amount, the vendee bought in the article, but in the name of the vendor, to avoid payment of a duty. Held, by these proceedings the vendee had lost the right to repudiate the contract, on the ground of variance from the sample, so far as it furnished any defence to a suit for the price, though he might have a remedy over against the vendor. The vendee chose to take the chance of making a profit on the re-sale. The contract was not wholly void, and he affirmed, by acting on it. Nor did it make any difference, that the goods were never transferred into his name.(3)

13. Where goods are sold to order and afterwards returned, the vendor, in a suit for the price, must prove that they are

(1) *Giles v. Edwards*, 7 T. R. 181. 2 Y. & J. 283, 4. See *Hunt v. Silk*, 5 E. 449.

(2) *Okell v. Smith*, 1 Stark. 107.

(3) *Parker v. Palmer*, 4 B. & A. 386.

made conformably to the order. The burden of proof is on him, and not on the defendant to show the contrary. As where a *riding-habit* was made, and returned upon the ground that it did not fit.(1)

14. Where the goods delivered are of the general kind ordered, though bad and unfit for use, the vendee, having paid the price, cannot recover it in an action for money had and received, as upon a total failure of consideration. As where *fish* were sold, though they proved to be worm-eaten and putrid. The remedy must be a special action. It was said, that if *saw-dust* had been delivered instead of fish, the former action might be sustained.(2)

15. Where a party who has contracted to make and sell an article within a certain time violates his contract, the proposed vendee may rescind the bargain, and, if he does, he acquires no title to the property, and by taking it subjects himself to an action.

16. The plaintiff's intestate agreed to make a wagon for the defendant, to be delivered in the spring of 1827 and paid for in mutton, which was accordingly supplied. The defendant selected wheels at the shop of the intestate, and marked them with his name, but there was no evidence of their being used for the wagon. The intestate died in May 1828. Before his death, the wagon was set up in the yard of his dwelling-house, and, once before and again after his death, painted by his son, who transacted business for him during his last sickness. A few days before his death, the intestate gave notice to the defendant, that the wagon was ready whenever he should choose to take it. In November 1827, the defendant gave his account for mutton to an attorney for collection, directing him to receive the wagon, which he accordingly demanded; but, not being delivered, he brought an action upon the account, agreeing however to discontinue upon delivery of the wagon. The intestate's estate was insolvent. In November 1828, the attorney, without directions from the defendant, and ignorant that he had taken the wagon, which he really had, presented the account to the com-

(1) *Hayden v. Hayward*, 1 Camp. 180.

(2) *Fortune v. Lingham*, 2 Camp. 416.

missioners of insolvency, who allowed it. The attorney said, if the plaintiff would give up his claim to the wagon, he would not present the account, but the plaintiff declined doing so. In 1829, the suit was discontinued. The plaintiff brings trover for the wagon. Held, the action should be sustained. The defendant had acquired no title to the wagon. He was bound by the doings of his attorney. He lawfully might, and did, rescind the contract. The agreement, which was merely *executory*, was broken by the intestate's neglect to build the wagon within the stipulated time; and for this breach the defendant had his remedy by action. He might waive his right of action and accept the wagon, but had no right to take it without the plaintiff's consent. The taking therefore was tortious.(1)

17. One party to a contract cannot rescind it, if circumstances have so changed, that it is impossible for both parties to be reinstated in their situation at the time the contract was made. Thus, if the title-deeds of a ship have been delivered to the vendee, and he has pledged them to a third person, and taken possession of the vessel; he cannot rescind the sale and recover back the price which he has paid, though the vendor refused to give a bill of sale or refund the money. So the vendee of a patent, which proves to be void, if he has used it to his advantage, cannot recover back the price.(2)

18. A bidder at auction may recall his bid at any time before the hammer is knocked down.(3)

19. Where a vendee agrees to pay the vendor by selling him other property, and violates the agreement, this is a rescinding of the bargain by the vendee, and authorizes the vendor to bring an action for the price.

20. A purchased of B two ploughs, the value of which was allowed B on settlement of accounts. B afterwards refused to deliver the ploughs and converted them to his own use. Held, A might treat the agreement as rescinded, and recover back the stipulated price in an action for money had and received; upon

(1) Bennett v. Platt, 9 Pick. 558.

(2) 5 E. 449. Beed v. Blandford, 2 Y. & J. 284. Brindley v. Tibbets, 7 Greenl. 70. Taylor v. Hare, 1 N. R. 260.

(3) Payne v. Cave, 3 T. R. 148. Ib. 653.

the ground that B had received *money's worth* to the amount claimed.(1)

21. In case of sale with warranty, on an agreement that the purchaser may return the article, (if dissatisfied), a mere *offer to return*, whether accepted or not, rescinds the bargain, and is either a defence to a suit for the price, or enables the vendee to recover it, if paid. The same rule applies to an absolute sale, if the vendor consents to take back the thing sold, unconditionally. But without such consent the contract remains open, and the vendee can maintain an action only upon the warranty, unless the vendor knew the article to be unsound, and the vendee offered to return it in reasonable time.(2)

22. Where a party exercises the right of rescinding a sale, he must rescind *in toto*, if at all. He will not be allowed to reclaim the property, and also recover damages for breach of contract. Thus, A exchanged with B oxen previously mortgaged by the former, though not delivered to the mortgagee; not disclosing the mortgage. B gave \$10 as *boot*, which he did not return or offer to return, but claimed to retain, because the oxen which he received had risen in value by good treatment, while the others had been hardly worked. Held, B might treat the exchange as fraudulent; but that it was merely voidable, not void, and he could not both reclaim the oxen and recover damages.(3)

SECTION IV.—EFFECT OF THE RESCINDING OF A SALE.

1. Goods sold can be taken on execution by a creditor of the purchaser, only when the contract between vendor and vendee is complete. Even a suspension of the contract will be a bar to seizure on execution; much more an entire rescinding of it.(4)

2. A agreed to sell B certain goods. Before any bill of par-

(1) Danforth v. Dewey, 3 N. H. 79.

(2) Thornton v. Wynn, 12 Wheat. 183.

(3) Junkins v. Simpson, 2 Shepl. 364.

(4) Bartram v. Farebrother, 4 Bing. 582.

cels made out or payment made, B removed the goods to the store of C, a commission merchant and a creditor of B. Afterwards the contract between A and B was rescinded, of which C had notice, but sold to D, taking his note for the price. Held, by the rescinding, the property re-vested in A, subject to no lien, and the sale to D was void. If D had paid his note, he might recover back the amount of it from C.(1)

3. After sale of a horse, it was agreed that the vendee might in reasonable time return it and receive back the price, if the horse should be in as good condition as when delivered. The vendee accordingly rescinded the bargain, and returned the horse to the vendor, who received it without objection and restored the price. Held, the vendor was estopped from suing the vendee on account of a deterioration of the horse in his hands, arising from a secret injury. The sale was under the circumstances unconditionally rescinded. Otherwise, the vendee might have chosen to retain the horse.(2)

4. The plaintiff agreed to sell, and the defendant to buy of him, a certain ship, which should be fitted like another one, named. Before the fittings were completed, the defendant repudiated the bargain, and refused to take the ship. Previous to such refusal, however, the plaintiff performed certain extra work upon the vessel, at the defendant's request. After the refusal, the plaintiff suspended his work, sold the ship, and brought an action against the defendant for the loss upon the sale. The declaration alleged, that the ship was fitted according to the form and effect of the agreement, and ready for delivery at the proper time. There was also a count for work and labor. Held, the plaintiff could not recover on the former count, because performance of the contract was a condition precedent; nor on the latter, for the extra work, because he had sold the ship.(3)

5. Where the vendor of a horse rescinds the sale, he is liable to the vendee for the expense of his keeping, from the day of the contract.(4)

(1) *Spring v. Coffin*, 10 Mass. 31.

(2) *Lord v. Kenny*, 13 John. 219.

(3) *Parmeter v. Burrell*, 3 C. & P. 144.

(4) *King v. Price*, 2 Chit. 416.

CHAPTER XI.

WHAT AVOIDS A SALE.

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SECTION I.—FRAUD, BETWEEN THE PARTIES.

1. Where goods are sold under a fraud, no action lies for the price.(1)

2. Law has concurrent jurisdiction with Equity in cases of fraud, and it is a rule both of equity and of law, that *suppressio veri* is equivalent to *suggestio falsi*.(2) On a question of fraud, the remedy at law is complete.(3) It is said, the distinction between jurisdiction of fraud at law and in equity, is, that in the former court it must be proved, and cannot be presumed; whereas in the latter it may be presumed.(4)*

(1) *Lewis v. Cosgrave*, 2 Taun. 2.

(2) *Fleming v. Slocum*, 18 John. 404. *Rhoades v. Selin*, 4 Wash. Cir. 715. *Brooks v. Carneal*, 1 Litt. 164.

(3) *Russell v. Clark*, 7 Cr. 69.

(4) *Per Woodworth, J., Gallatin v. Cunningham*, 8 Cow. 361.

* In an action at law on a specialty, fraud in relation to its consideration is no defence. *Dule v. Roosevelt*, 9 Cow. 307. *Jackson v. Hills*, 8. 290. But relief may be had in Equity. *Per Viele, Senator, ib.*

Equity will not take jurisdiction, in case of fraud in selling diseased slaves, for the purpose of giving compensation in damages—but only where the contract ought to be rescinded. *Cocke v. Hardin*, Litt. 374.

It will not relieve, where, after discovery of the disease, the purchaser did not offer to return the slave and cancel the contract, but continued to employ him till his death. *Ib.*

A bill in Equity to vacate a contract for fraud should put the fraud in issue. *Coffman v. Allin*, Litt. 201.

3. A vendee is not bound to inform the vendor of extrinsic facts exclusively within his knowledge which may affect the price; but neither party is at liberty to say any thing which tends to impose upon the other.(1) (See *Warranty*.)

4. In case of a fraudulent purchase—as where the vendee is insolvent, knows himself to be so, and has no reasonable expectation of paying for the goods; or where he fraudulently misrepresents his ability to pay; he gains no title against the vendor, provided the latter reclaims the property immediately upon discovery of the fraud. The same is true with respect to a *bona fide* creditor of the vendee, whose claim accrued before the sale, and who therefore did not trust upon the credit of these goods, claiming under a legal process against the vendee. The vendor may maintain replevin against the officer who seizes the property under such process, after a demand. But a sale of the above description is only voidable, not void. Hence, one who *bona fide* purchases from the first vendee, before the vendor elects to avoid the sale, (or, it seems, an attaching creditor whose claim accrued after the sale), will hold against the vendor.* A *purchaser*, is one who obtains the goods from the vendee in *the usual course of trade*, without notice; in other words, one who gives value for them, by making advances, or incurring responsibilities, or taking them in pledge for money loaned upon their security. But not one, who receives them in payment or as security for a prior debt.(2)

5. Where goods are obtained by a person knowing himself to be in danger of insolvency, by means of bills drawn on other

(1) *Laidlaw v. Organ*, 2 Wheat. 178.

(2) *Root v. French*, 13 Wend. 570. 20 John. 651. 4 Bin. 368. *Buffington v. Gerrish*, 15 Mass. 156. *Durell v. Haley*, 1 Paige, 492.

Equity will relieve, on a wholesale contract for merchandize, the seller falsely representing that it was bought in Philadelphia, and that he sold it at 12 1-2 per cent advance on the Philadelphia price. *Blacks v. Catlett*, 3 Litt. 139.

On a bill for rescission of a contract, the question of fraud is for the chancellor to decide, not for a jury. *Goodloe v. McLanathan*, 6 Mon. 310.

* It is otherwise in the case of goods obtained by *felony*. A felon gains no right of property or possession, and can convey none. In the former case, mentioned in the text, the vendee's possession, which gave an appearance of ownership, was *with the vendor's consent*. *Rowley v. Bigelow*, 12 Pick. 307. (See ss. 12, 13.)

insolvent persons; the sale is not void, unless the bills were contrived expressly for the purpose of obtaining the goods. Thus, where one went to Glasgow from London, with the intention of purchasing goods from those who were ignorant of his own want of credit, and that of the drawees of the bill; it was held that the sale was not void, unless it was proved by what means he persuaded the vendor to sell.(1)

6. A vendee of goods gains no title, and cannot retain them, if he obtained possession by gross fraud, under color of a purchase, whether on credit or otherwise. So, it seems, where he purchased with the previous intention of not paying; of which an immediate re-sale at reduced prices is proper evidence. But the mere fact, of a vendee's knowing his own inability at the time to pay for the goods, it seems, does not avoid the sale.(2)*

7. The defendant purchased goods from the plaintiff, to the amount of about \$700, and gave his note therefor, payable in six months. He also represented that he was worth about \$2000; but in one month became insolvent, and then stated to his creditors, that his assets were a little more than \$4000, and his liabilities a little more than \$11,000, and proposed to pay 25 per cent. The plaintiff brings *trover* for the goods, and

(1) *Noble v. Adams*, 2 Marsh. 366. 7 Taun. 59.

(2) *Chit. on Contr.* 321. *Earl, &c. v. Wilmore*, 1 B. & C. 514. (4 Bing. 476. 9 B. & C. 59.) *Irving v. Motly*, 7 Bing. 551.

* A and B agreed for the sale of a chaise by the former to the latter. B to give his notes for the price, at twelve months, to keep possession of the property and use it at his pleasure, but A to retain the ownership till payment. B accordingly gave his notes and received the chaise, used it as his own, and within the year sold it to C, who had no notice of A's claim. C used the chaise several months, with the knowledge of A, and after the expiration of the year sold to D. At the time of the contract and during the year, B was solvent, but afterwards became insolvent. A brings *trover* against C. Held, the action would lie. There was no fraudulent delay or acquiescence on the part of A; though, if B had been insolvent at the time, with the knowledge of A, this might have been evidence of fraud. *Sawyer v. Shaw*, 9 Greenl. 47.

A mutual *mistake* of the parties as to the circumstances of the vendee is no ground for relief in Law or Equity. Thus, where a large amount of goods has been sold to a merchant in good credit, who considered himself and was regarded by others as solvent, but eleven days after the sale proved to be bankrupt; this is no case for relief in a Court of Equity on the ground of *mistake*. If it were, the consequence would be the greatest confusion in the mercantile world. Every purchaser, though solvent, would be liable to have his circumstances exposed to the public eye. *Lupin v. Marie*, 6 Wend. 77.

produces the note at the trial, but without having offered to return it before suit brought. The defendant's counsel declines the plaintiff's offer to give up the note, and it is thereupon placed upon the files of the Court. Held, the plaintiff might at any time rescind the sale as a mere nullity, except as against some *bona fide* purchaser for valuable consideration; that a *conversion* took place *at the time of sale*, and no demand was necessary to maintain the action; that if the note was not negotiable, it need not be returned, because the rescinding made it void; and if negotiable and not actually negotiated, it was sufficient to bring it into Court (1).

8. A debtor confessed judgment, and fraudulently purchased goods and obtained a delivery of them without payment, for the purpose of having them taken on execution. Held, he had gained no title, and the property was not liable to be taken upon execution.(2)

9. The plaintiff, at Birmingham, forwarded by the defendant, a carrier, a box directed to J. West, Great Winchester St., London; having previously sold the goods to a person falsely assuming that name, tendering a fictitious bill in payment, and ordering them to be thus directed. The defendant, finding there was no such person at the place named, but receiving a letter with the above signature, requesting that the box should be sent to an inn at St. Alban's; accordingly delivered it there to a person calling himself J. West, and who showed that he was acquainted with the contents. This person absconded, without payment. In an action of trover by the plaintiff against the defendant, held the defendant was liable for the value of the goods. They were at first obtained by fraud,—sold to a felon,* who did not mean to purchase, but to commit a felony. In determining whether any property passed, the question is, not what the seller, but what the buyer, intended to do. Originally, the contract was between the defendant and the supposed purchaser. But when the defendant discovered that there was no such person at the appointed place, this contract came to an end, and

(1) *Thurston v. Blanchard*, Suffolk, March 1839. Law Reporter, July —39, p. 80. 22 Pick. 18.

(2) *Van Cleef v. Fleel*, 15 John. 147. *Durell v. Haley*, 1 Paige, 492.

* Park, J. said "I will not call him swindler."

the defendant began to hold the property, by an implied contract, for the plaintiff.(1)

10. A went to the shop of B and proposed to purchase goods. B agreed to sell, and deliver them at Lad lane the same evening. On arriving there, A said he expected a friend with the money, who would give it to him (A) at Tom's coffee-house, and appointed to meet B there in an hour. B accordingly left the goods, and A absconded with them. In determining whether the property passed from B, the question was left to the jury whether A intended to buy or steal; and, upon their finding the latter, it was decided that the property did not pass.(2) (See s. 4, note.)

11. To prove fraud in a sale on the ground that the vendee did not intend to pay for the property, it is not absolutely necessary to show a false pretence or other direct artifice in regard to the individual purchase. It is sufficient, if such purchase is one of a series of acts, which, all together, indicate a design to obtain the goods without payment, of which these are a part. As where an inordinately large quantity is purchased from many persons, in proportion to the regular purposes of the party's apparent business; where the goods are not kept or dealt with in such place or manner, as to show a fair acquisition for the purposes of regular business; where there have been forced sales, at a sacrifice, of goods purchased shortly before on credit, or subsequent conversations and conduct, showing a design to evade payment and unjustly appropriate the property. It seems, the goods cannot be followed into the hands of a *bona fide* purchaser from the original vendee.(3)

12. The same kind of deceit or misrepresentation, which renders a sale void, furnishes a good ground of action by the vendee against the vendor or a third person.

13. Where A induces B to sell goods on credit to C, whom he would not otherwise have trusted, by asserting what he knows to be false; the assertion alone is no sufficient ground of action, but it must be proved to be false, and that the defendant knew

(1) *Stephenson v. Hart*, 4 Bing. 476. (See *Aickles's case*, 1 Leach, 294.)

(2) *Campbell's case*, cited 4 Bing. 483.

(3) *Mackinley v. M'Gregor*, 3 Whart. 369.

it to be so. The principle is, that if one wickedly assert what he knows to be false, and draws another into loss, he is liable to an action for damages. In such action it must be alleged, that the defendant, intending to deceive and defraud, did deceitfully encourage and persuade the plaintiff, and for that purpose made a false affirmation, whereby the plaintiff acted.(1)

14. Where one sends his servant to buy a horse, who buys and pays for it, and the vendor represents to the master that he has not been paid, whereby the latter is induced to pay a second time; an action lies against the vendor.(2)

15. *Cheating*, at common law, was an indictable offence; but it must consist in some act of a nature to affect the public, and such as common prudence could not guard against. St. 33 Hen. 8. ch. 1. made provision against the act of obtaining money, goods, &c. by a *false token*. But the act does not apply, where there has been a want of common prudence. St. 30 Geo. 2, ch. 1, makes it an indictable offence to obtain money, goods, &c. upon *false pretences*; which before this act would not be sufficient, without a *false token*. This last act was never in force in Massachusetts, but, a similar act having been passed, the English decisions are applicable. To bring a case within this statute, there must be false pretences, or stories and misrepresentations deceiving and intended to deceive the vendor, and fraudulently contrived for that purpose. Barely asking one for money is not sufficient. So where one pretended that he wished to purchase lottery tickets to a large amount, and bought a quantity of tickets, paying for them by a draft upon a banker in whose hands he represented himself to have funds, but knew that he had not, held, an indictment could not be sustained upon these facts. There was nothing in the case but the party's own assertion. The check could not be considered as a *false token*. It left his credit precisely where it was before.(3) So, where one receives money upon the false pretence of having a message

(1) *Pasley v. Freeman*, 3 T. R. 51.

(2) *Com. Dig. Action on the Case, &c. A 10.*

(3) 1 Hawk. ch. 71. 2 Burr. 1125. 1 Greenl. 387. 6 Mod. 105. 301. 42. 61. 5 Mod. 11. 11 Mod. 222. *Ld. Ray.* 1013. *Com. v. Warren*, 6 Mass. 72. *Young v. Rex*, 3 T. R. 98. See *State v. Wilson*, 2 Con. S. C. 135. *Rex v. Lara*, 6 T. R. 565.

or order for it, this is not indictable, there being no artful contrivance, but a bare, naked lie.(1)*

16. It is not a fraudulent act, for a vendor to re-purchase from his vendee through a third person, who does not disclose that he acts for the vendor.

17. A sold goods to B, to be paid for by a bill at two months. B declining to give the bill, and being in danger of insolvency, A procured a broker to re-purchase the property in his own name, at a price much lower than the former one. B became bankrupt, not knowing that the re-purchase was made on A's account; and his assignees bring trover for the goods against A. Held, there was no fraud on the part of A, and the action could not be sustained.(2)

18. But where one person purchases goods professedly for another at a certain price, and the vendor privately agrees with the real purchaser to pay him a further sum, this is a fraud upon the nominal vendee, and the vendor cannot recover such additional price.

19. Thus, A, taking a house which had been tenanted by B, was to take the goods therein at an appraisal. Not having the necessary funds, A applied to C, who thereupon purchased the goods for A, taking a bill of sale to himself, in which the consideration was expressed; but B made a private agreement with A to pay him (B) an additional sum. Held, this agreement was a fraud upon C, and could not be enforced against A.(3)

20. Where one obtains property by fraud, and therefore by a void title, and then disposes of it to another, the latter may set up the original fraud in defence to a claim for the price. Thus a note, given in consideration of a patent, which was obtained by fraud, void, though the conveyance were by deed, with covenants

(1) Hawk. b. 1, ch. 71, s. 2

(2) *Harris v. Lunell*, 4 Moore, 10.

(3) *Jackson v. Duchaire*, 3 T. R. 551.

* Obtaining horses from an ignorant person by threats of a criminal prosecution for horse-stealing, and by threats of his life, is swindling under the act (of S. C.) of 1791. *State v. Vaughan*, 1 Bay. 282. In the same state, selling a blind horse as sound is not indictable—though ground for an action of deceit. *State v. Delyon*, 1 Bay. 353.

of warranty, and though the vendor has furnished the vendee instruction, materials and labor in relation to the art which is patented; because these are useful only as connected with the art itself.(1)

SECTION II.—FRAUD AGAINST CREDITORS, &c.

1. In addition to the fraud which avoids a sale *as between the parties*, there is a species of fraud having reference only to creditors of, or subsequent purchasers from, the vendor, and by reason of which such creditors or purchasers may claim the property out of the vendee's hands. One of the principal evidences of this kind of fraud has been already considered at length; viz. the retaining of possession by the vendor after a sale. (See ch. 2.) In some other important points of view, the subject now remains to be considered.

2. It is said, that every man may dispose of his own property as he pleases; but always subject to the equitable principle, that he is not to injure another by his gift.(2)

3. It is a maxim of the common law, that "fraud vitiates every thing." But the doctrine of *fraudulent conveyances*, so called, rests chiefly upon an ancient English statute, 13 Eliz. ch. 5, which was passed to do away all doubts upon the subject, and to affirm expressly the implied principles of the common law.(3)*

4. One of the earliest, and the most important of the expositions of the Statute, above referred to, is *Twyne's case*, decided in the Star Chamber in the 44th year of Elizabeth. The principles therein settled have been recognized as law in most of the sub-

(1) *Bliss v. Negus*, 8 Mass. 46.

(2) *Marcy v. Clark*, 17 Mass. 334.

(3) See *Cowp.* 434.

* It is remarked by a high American authority, that the doctrine of fraudulent sales of goods rests upon the more ancient statutes, 50 Edw. 3, ch. 6, 3 Hen. 7, ch. 4, and that the statutes, 13 Eliz. ch. 5, 27 Eliz. ch. 4, apply to lands only. 1 Story Eq. 343. 1 Cranch, 309.

sequent cases. The facts were as follows. A, being indebted to B in the sum of £400, and to C in the sum of £200, and being possessed of personal property worth £300; pending an action against him by C, secretly conveyed by deed all his goods and chattels, real and personal, whatsoever, to B, in satisfaction of his debt, expressly stating that it was done honestly, truly and *bona fide*. A, however, still retained possession, sold some of the property, sheared the sheep and marked them with his own mark. C, having recovered judgment, put his execution into the sheriff's hands, who undertook to levy it upon the property conveyed to B, but certain persons under B's direction made forcible resistance, claiming the goods as B's, under a transfer made for good and lawful consideration. Upon the question whether this was a fraudulent conveyance, held, it was; because, 1. it was *general*, not excepting even apparel or other necessities, and "*dolus versatur in generalibus*"; 2. A remained in possession. (see *Delivery*.) 3. the gift was *secret*, and "*dona clandestina sunt semper suspiciosa*"; 4. it was made pending the writ; 5. there was *a trust*, proved by A's continued possession; 6. the statement that the transfer was an honest one was an unusual clause, and "*clausulæ inconsuetæ semper inducunt suspicionem*." The exception in the Statute of Elizabeth, being of any transfer made "on good consideration and *bona fide*," did not apply to this case; because, although B's debt was consideration enough, the transfer was not made *in good faith*, on account of the secret trust. Thus if one owe several persons £20 each, and, having goods worth £20, convey them to one of his creditors in satisfaction of his debt, but subject to a trust, that the donee shall deal favorably with him in regard of his poor estate, either to permit the donor or some other for him or for his benefit to use or have possession of them, and is contented that he shall pay him his debt when he is able; this is void, because not *bona fide*. Ld. Coke, the reporter, goes on to advise, that when any gift shall be to you in satisfaction of a debt, by one who is indebted to others also; 1. let it be in a public manner and before the neighbors; 2. let the goods and chattels be appraised by good people to the very value, and take a gift in particular in satisfaction of your debt; 3. immediately

after the gift take the possession of them. He further remarks, that every gift, though *bona fide*, is not made for good consideration. Thus if one, being indebted, conveys all his goods to his son or cousin in consideration of natural affection, this is void against creditors, because the consideration is not a *valuable* one; and, as the claims hereby defeated are valuable, equity requires that the conveyance which defeats them should be on equally high and good consideration; and it is to be presumed that the father, if not in debt, would not have dispossessed himself of all his goods, and *subjected himself to his cradle*; and therefore it shall be intended, that it was made to defeat his creditors. (1)

5. As appears from the above case, where the terms of a sale provide a *trust* for the vendor, the sale is fraudulent. And possession by him is *prima facie* evidence of such trust. The same rule applies, though he be not in possession at first, but the property is left with him under a subsequent contract to take it and pay rent. The question whether a trust existed, is for the jury; but, when admitted or proved, the inference from it is an inference of law, which the Court is bound to make. The nature of the trust reserved is immaterial. It may be the use of the goods, or some other favor. *Ld. Coke* says, "what is a *trust, per nomen speciosum*, between donor and donee, is, as to creditors, *fraud*." An *express* trust, is where the terms of it are specified. An *implied* trust, is where the sale is for no consideration, or a *good* one only. In the latter case, the law presumes, that a benefited relation will relieve a donor who is in debt. And an express trust may consist in some secret understanding. But a trust does not avoid the sale as against a creditor having notice of the sale. He is a *quasi* party. So, *marriage settlements* are exceptions to the general rule. In these, possession is consistent with *bona fides*. On this subject, *Richardson*, Ch. J. remarks, that there is no contradiction in the decisions, though there are some contradictory *dicta*. (2)

(1) *Twyne's case*, 3 Co. 80.

(2) *Coburn v. Pickering*, 3 N. H. 415. *Edwards v. Harben*, 2 T. R. 587. *Twyne's case*, 3 Co. 80. *Hamilton v. Russell*, 1 Cranch, 309. *Dawes v. Cope*, 4 Bin. 258. *U. S. v. Hoee*, 3 Cranch, 73. 1 Pick. 295. 1 Esp. 205. 1 Camp. 332. *Steel v. Brown*, 1 Taun. 381. *Cadogan v. Kennett*, Cowp 432. *Haselinton v. Gill*, 3 T. R. 900 n.

6. In case of a bill of sale or other transfer apparently absolute, any secret trust or agreement, inconsistent with the tenor of such instrument, is *evidence* of fraud as against creditors. But it is not *actual fraud* or conclusive evidence of it, except in the case of real estate, where the whole agreement ought to appear in the deed or some other writing of as high a nature. So, inadequacy of indebtedness on the part of a vendor is not *per se* fraudulent. (1)

7. Liability to future damage as a surety, is no sufficient consideration for an absolute bill of sale, as against creditors. (2)

8. But where a bill of sale, in terms absolute, is in fact made for security, this fact is not *per se* conclusive of fraud, but merely evidence for the jury. If both parties prove that the instrument, though absolute in form, is designed for security, and made *bona fide*; it is valid as a mortgage. Whether an attaching creditor of the vendor can be admitted to show this fact, qu. (3)

9. Where a vendee gives a bond of defeasance to the vendor, and the property is afterwards attached by creditors of the latter, in a suit against the attaching officer, the vendee must produce the bond, or account for its non-production, by showing due diligence to procure it. Parol evidence of such bond is inadmissible. The vendor might be summoned as a witness, and the bond, being in his hands, would then be forth coming. (4)

10. It may be inferred from *Twyne's case*, and seems to be well settled, that the question, whether an assignment to a creditor, of an amount of property much exceeding his debt, shall be held wholly fraudulent and void against other creditors; depends upon the consideration, whether the assignee knew the existence of other debts, and the debtor's fraudulent intention, or honestly designed to hold the surplus as trustee for the debtor; or, in other words, whether there was *actual* or merely *constructive* fraud. *Actual* fraud avoids the conveyance *in toto*, so that it cannot stand as security for reimbursement or indem-

(1) *New England, &c. v. Chandler*, 16 Mass. 275. *Adams v. Wheeler*, 10 Pick. 199.

(2) *Gorham v. Herrick*, 2 Greenl. 87.

(3) *Reed v. Jewett*, 5 Greenl. 36.

(4) *Gorham v. Herrick*, 2 Greenl. 87.

nity of advances really made. But *constructive* fraud avoids it only for the excess of the value of the property over and above the claim to be secured.* An assignment, made partly to secure a just debt and partly to defeat creditors, is wholly void.(1)

11. Where A, being indebted to B and C, is sued by B, he may still make a valid conveyance to C. Thus, if B have taken out execution, A may voluntarily give C a warrant of attorney to confess judgment, which may be immediately entered, and execution be thereupon levied on the same day when B might and had threatened to sue out execution; and C's title shall prevail over B's. So a debtor, pending a suit against him by one of his creditors, may assign all his property in trust for all of them; the object of such conveyance being highly equitable and honest, though made with intent to delay the suing creditor of his execution.(2)

12. A conveyance is not void as against *subsequent* creditors, unless it be not only *voluntary*, but *collusive and fraudulent*, and made with a view to future debts.(3)

13. It seems, the Statute of Elizabeth does not apply to property of such a nature as could not be reached by legal process.(4)

14. The following cases may be cited, as illustrating the gen-

(1) *Wilson v. Wormal*, Godb. 161. 4 Rand. 282. 4 John. 599. Long, 122, 3. 4 John. 598, 9. 2 Ves. 517. 2 Sch. & Lef. 492. *Maguiac v. Thompson*, 1 Bald. 344. *Tucker v. Welsh*, 17 Mass. 164.

(2) *Holbird v. Anderson*, 5 T. R. 235. *Pickstock v. Lyster*, 3 M. & S. 371. 3 Price, 6. 4 E. 1. 6 C. & P. 142.

(3) 8 Wheat. 220. 4 Wend. 300. 6 Paige, 526.

(4) 1 Story's Eq. 361.

* In the late American edition of *Long on Sales*, the Editor remarks, (p. 123) that "in a court proceeding according to the course of the common law, where actual fraud alone is regarded, if a conveyance is found to be fraudulent against a creditor, he can avoid it unconditionally, &c. It is otherwise, however, in cases where no actual fraud was in contemplation, but where the conveyance was made or obtained under such suspicious or inequitable circumstances, that a Court of Equity may set it aside, as being constructively fraudulent." It would seem, that a distinction between actual and constructive fraud, depending upon the tribunal resorted to for relief, is not strictly accurate. A Court of Law, no less than a Court of Equity, has power to avoid a sale for constructive fraud; as, for instance, where the vendor remains in possession, although no fraudulent intention be proved.

eral points on the subject of fraudulent conveyances, above stated.

15. Assignment in trust, of a part of the debtor's property, from the rents and profits to pay one half for his use, and the other to particular creditors. If there is no intention of fraudulently delaying other creditors, such assignment is valid.(1)

16. A, being in debt, delivered certain goods to B, a creditor, for more than their value, with a bill of parcels describing the articles and their prices, and stating that they were bought and paid for. It was agreed between the parties, that B should sell the goods, apply the proceeds to pay his debt, and account to A for the surplus. Held, a void sale.(2)

17. A *bona fide* creditor said to his debtor, that he wished to have a conveyance of his property, rather to prevent attachment by other creditors than for his own security. A transfer being accordingly made, held, the above declaration merely raised a *presumption* of fraud.(3)

18. A, "in consideration of indebtedness," conveyed to the plaintiff certain property by a written instrument containing this clause; "and it is agreed that the debtor shall remain in possession, till default of payment of what may be due to the plaintiff, at such time as he shall demand payment." The property was subsequently delivered. The sale was proved to be *bona fide*. Held, the property passed as against creditors of the vendor, and might be held as security for subsequent liabilities on his account. The vendee was subject to be summoned as trustee of the vendor, which would prevent any claim for advances, made after service of the writ upon him.(4)

19. A, being indebted to a bank, besides a cash deposit, transferred to B, the cashier, shares in the bank and in an insurance company. The transfer was in form unconditional, but there was an understanding between the parties, that it was to be for collateral security only, and that any surplus remaining, after payment of the debt was to be paid to A. There was ev-

(1) *Estwick v. Caillaud*, 5 T. R. 420.

(2) *Parker v. Pattee*, 4 N. H. 176.

(3) *Reynolds v. Wilkins*, 2 Shepl. 104.

(4) *Adams v. Wheeler*, 10 Pick. 199.

idence that the bank consented to the arrangement. Held, the transfer was valid, and the cashier was a trustee of A as to the surplus proceeds. The conveyance was not in law made to *the bank*, though B was mentioned as cashier, and took in that capacity. B was a depositary for the benefit of the bank and of A, and the word *cashier* was a mere term of designation. B only had control of the property and could assign it, and though a sale by him without authority would be a violation of his duty to the bank, yet a purchaser ignorant of the facts would take a title. The transaction was not a fraudulent one. The object was a fair one, viz. payment of an honest debt. Though an indiscreet arrangement, there was no attempt to secrete the property from creditors. It is a common usage for banks to take security, without any formal stipulations as to disposing of the property.(1)

20. A, being in embarrassed circumstances, gave a bill of sale of a ship to B, without consideration, and for the purpose of preventing an attachment by his creditors. B, with the consent of A, reconveyed the vessel to C, one of A's creditors. Held, C should hold against other creditors of A.(2)*

21. A bill of sale or assignment of goods set forth as the object of the instrument, to secure the party taking it against his liabilities as surety for the other, and provided that if the former should become answerable thereupon he might turn out the goods upon execution or dispose of them at private sale, accounting for the proceeds. Held, the transaction was in nature of a mortgage, and, as the possession of the mortgagor was conformable to the terms of the instrument, there was no proof of fraud against creditors, and he retained no interest liable to be taken by them.(3)

22. Bona fide conveyance by a debtor of all his property,

(1) *New England, &c. v. Chandler*, 16 Mass. 275.

(2) *Boyd v. Brown*, 17 Pick. 453.

(3) *Marsh v. Lawrence*, 4 Cow. 461.

* C, in consideration of the transfer to him, agreed to indorse a certain sum upon a note which he held against A. The vessel being afterwards attached by A's creditors, held, if the attachment was prior to the indorsement, and the latter ante-dated, this was not conclusive of fraud, but only circumstantial evidence for the jury. *Ib.*

(consisting mostly of his wife's former estate,) to trustees, in consideration of a certain sum to be paid by one of them, in trust to sell, and from the proceeds to pay such trustee's own claims, and then all such debts as the trustees should think proper, and to hold the surplus for the wife as a separate maintenance. Held, the assignment was valid, all the creditors known at the time having received payment of their debts.(1)

23. A sale void against creditors is valid not only between the parties, but also between the grantee and a third person for whose benefit it is made.

24. Thus, where one conveys to his children in fraud of creditors, the fraud is no defence to an action, brought by the children against the party who receives, and agrees to account to them for the property. The transaction is not *illegal*, and, though liable to be avoided by creditors, is valid against all others.(2)

25. Though a sale be void against creditors, a subsequent vendee, for valuable consideration and without notice, acquires a good title.(3)

26. A sale made by one person cannot be proved fraudulent by evidence relating to a sale by another, although the vendors are owners in common of the same property. Thus, where one sells an undivided part of a vessel to A, and the rest to B, and the ship is afterwards re-conveyed to the vendor; in a suit by the vendor against an officer who attaches her on behalf of A's creditors, the defendant cannot show fraud in the re-conveyance by B, as proof of fraud in the re-conveyance by A.(4)

27. It has been held in Massachusetts, that where the member of a manufacturing corporation transferred his shares to an insolvent person, in order to avoid payment of an execution against the company; the transfer was fraudulent and void, under St. 1817 ch. 183, which rendered the body or estate of an individual corporator liable for such execution. So a sale of goods with this object is void. The above Statute provided, that such persons as were members *when the debt was incurred*

(1) *Nunn v. Wilsmore*, 8 T. R. 521.

(2) *Fairbanks v. Blackington*, 9 Pick. 93.

(3) *Trott v. Warren*, 2 Fairf. 227.

(4) *Boyd v. Brown*, 17 Pick. 453.

should be liable. Hence, this liability would continue, notwithstanding even a *bona fide* transfer; and it would be no valid objection to such liability, that a former corporator is no party to the suit on the judgment. And therefore that to charge him would be a violation of the constitution and bill of rights. Under St. 1808, ch. 65, an execution could bind only those who were members at the time of the levy.(1)

28. In case of a fraudulent conveyance, a creditor may avail himself of the property transferred, either by a direct attachment or a trustee process.(2)

29. A peculiar instance of fraud in relation to creditors, is where a person conveys his property to one or more creditors, in expectation or *contemplation of bankruptcy*. Under the English bankrupt law every such conveyance is void; and the insolvent laws of Massachusetts, and probably of all the other states where such a law exists, contain a similar express provision.

30. Such conveyance is held void, though the debtor were in full credit at the time. So a conveyance of all a man's property in trade, to pay a *bona fide* debt, however meritorious, and however exceeding the value of the property, is void, because it is out of the course of business, and must necessarily produce bankruptcy. So although a part merely *colorable* is excepted. So a conveyance, for the benefit of all the creditors but one, is void; or a conveyance providing for distribution, as the statutes of bankruptcy would distribute; no man being allowed to choose his own assignees. Where the debtor's situation and conduct clearly show his own expectation of eventual bankruptcy, the transfer will be void. Otherwise, where he *bona fide* hopes to escape such a result.(3)*

(1) *Marcy v. Clark*, 17 Mass. 330.

(2) *Hastings v. Baldwin*, 17 Mass. 552. *Burlingame v. Bell*, 16. 318.

(3) *Hassells v. Simpson*, Dougl. 89, n. 2 Burr. 827. 1 W. Bl. 362. 1 Brod. & B. 408. Long, 371. 4 B. & Ad. 831. 3 Scott, 229.

* The cases of *Small v. Oudley*, (2 P. Wms. 427. 1 Burr. 480,) and *Hooper v. Smith*, (1 W. Bl. 441,) seem to conflict with the general tenor of the authorities on this subject. But these decisions are denied to be law in *Long on Sales*, (378,) in 4 Burr. 2240, Cowp. 124, and 3 Mass. 325.

31. Where a conveyance is void on the above ground, though the assignees may, they are not bound to treat it as void; but may affirm and act under it.(1)

32. In order to avoid a conveyance for the cause above referred to, it is necessary to prove, not only that the debtor knew himself to be insolvent, but that he made the transfer in contemplation of bankruptcy, and himself took the first steps towards it, for the purpose of giving an illegal preference. If the conveyance is made through the importunity of the preferred creditor, or under the threat or fear of legal process, even though such fear be unfounded, the law will not avoid it. And where the circumstances raise or admit a doubt as to the controlling motive under which a transfer or payment was made, (or, in general, whether it was a fraud upon the bankrupt law); the question is for a jury to settle.(2)

33. To the determination of this question the maxim has been applied, that every man may be supposed to contemplate the necessary and usual consequences of his acts. The necessary effect of a debtor's conveying his whole property to one creditor, is to break up his business, and deprive the others of their ordinary legal remedy to enforce their demands. Hence, such conveyance is to be deemed an act of bankruptcy and fraudulent against creditors.(3)

34. Where creditors express to a debtor their determination to obtain either payment or security, and he thereupon conveys to them his whole stock, and immediately quits his house and business; the law will not intend that such conveyance was induced by the urgency of creditors: because, if they had taken out immediate process against him, he could have been placed in no worse situation than that in which he placed himself by the transfer; and the conveyance will therefore be held void.(4)

35. But where a debtor intends, voluntarily, and in contemplation of bankruptcy, to make a conveyance to a creditor, and

(1) *Nixon v. Jenkins*, 2 H. Bl. 135.

(2) 5 B. & Ad. 289. 2 Bing. N. C. 225. 10 B. & C. 44. 9 Bing. 349. 6 C. & P. 611. 1 T. R. 155. 2 Cr. M. & R. 580. 10 Bing. 408. 3 M. & Sc. 127. 3 Scott, 237. 7 Bin. 432. 5 Taun. 539. 5 B. & Ad. 289.

(3) *Gibson v. Boutts*, 3 Scott, 236.

(4) *Thornton v. Hargreaves*, 7 E. 544.

does the first act towards such conveyance, but, before its consummation, the creditor takes measures to enforce payment; the transfer is not void. As where a debtor put checks into the hands of his clerk, to be delivered at the creditor's counting-house, which was done, but they did not reach the creditor till after he had demanded payment. So where a creditor, knowing the debtor to be embarrassed and insolvent, demanded security about two months before his bankruptcy, and received a conveyance of part of his stock in trade; although the creditor did not threaten a suit, the conveyance was held good. In this case, the bankrupt made oath to the fairness of the transaction, and that he did not at the time contemplate bankruptcy.(1)

36. Where the property conveyed by the debtor equitably belongs to the person to or for whom the conveyance is made, though legally a part of the debtor's estate; as, for instance, where it consists of money held in trust for the debtor's children; the conveyance will not be void, more especially in the absence of clear proof that it was made in contemplation of bankruptcy, though the party must have had apprehensions of such an event.(2) Thus, A had engaged to transfer bank stock to B, to secure him as an indorser for A. Not having the stock when applied to for the transfer, A, at B's instance, conveyed land to C, who took up the notes. Held, though A had committed an act of bankruptcy before he conveyed the land, yet the conveyance was valid; and B's preference, thus obtained, was only a substantial fulfilment of A's original engagement, when B indorsed the notes.(3)*

(1) Bayley v. Ballard, 1 Camp. 416. Smith v. Payne, 6 T. R. 152.

(2) 10 Mod. 489. 1 Burr. 478. 481.

(3) M'Meehan v. Grundy, 3 Har. & J. 185.

* Under the old bankrupt law of the United States, giving voluntary preference to one creditor was not an act of bankruptcy, though if given on the eve, and in contemplation, of bankruptcy, it was void. Harrison v. Sterry, 5 Cranch, 301. Locke v. Winning, 3 Mass. 325. Barnes v. Billington, 1 Wash. 29. Ogden v. Jackson, 1 John. 370. The term "conveyance" in the bankrupt act meant an instrument *under seal*; and therefore a fraudulent sale or transfer of personal property, unless by a sealed instrument, was not an act of bankruptcy. Livermore v. Bagley, 3 Mass. 487. Paying money or giving security to a creditor, in contemplation of bankruptcy, and with a view to prefer him, was valid, if it were not voluntary, but the effect of measures tak-

37. The following cases may be cited in illustration of the several points above stated.

38. A, a trader, conveyed all his stock to B, by way of security for all the money which B should advance to him, but retained possession of the property. Held an illegal preference in fraud of the bankrupt laws, and therefore void.(1)

39. The brother of the plaintiff, carrying on business in two shops, an upper and a lower one, and being indebted to the plaintiff, assigned to him his goods in the upper shop, being one third of his stock, for the purpose of giving him a preference and in contemplation of bankruptcy. Held void.(2)

40. A, the acceptor of a bill, two days before its maturity, called upon B, the drawer, and informed him that he was insolvent. The drawer required payment, offering to secure to the creditors, in the event of a composition with them, the proceeds of A's property. A accordingly paid the bill, and four days afterwards became bankrupt. It appeared, that the bill had been altered so as to make it fall due before this transaction, but not with the knowledge of B. Held, on the grounds that such alteration showed a fraudulent intent, and that the first movement was made by A and not by B, the payment was void, and A's assignees might recover the amount in an action for money had and received against B.(3)

(1) Worsley v. De Mattos, 1 Burr. 467.

(2) Linton v. Bartlett, Cowp. 120.

(3) Singleton v. Butler, 2 B. & P. 283.

en by the creditor. 1 John. 370. Phoenix v. Dey, 5 John. 412. M'Mechen v. Grundy, 3 Har. & J. 185. A conveyance to secure a *bona fide* creditor, if made before June 1, 1800, was valid, though made in contemplation of bankruptcy, the bankrupt act not having gone into operation till that day. M'Menomy v. Roosevelt, 3 John. Ch. 446. A deed executed and delivered before that day, though not acknowledged till after, was valid. Wood v. Owings, 1 Cranch, 239. A, being in embarrassed circumstances, April 15, 1800, conveyed certain lands, and May 31, 1800, executed a writing, declaring the conveyance to be made in trust for the payment of certain preferred creditors. June 13, A drew an order on B his agent, directing him to pay C such monies as he might receive from particular persons, which order B on the same day accepted. July 11, A committed an act of bankruptcy, and, July 18, was duly declared a bankrupt. The assignees of A bring an action against B, upon the order. Held, the order and acceptance constituted an assignment of the funds referred to, and the order was not fraudulent, as given in contemplation of bankruptcy. M'Menomy v. Ferrers, 3 John. 71.

41. By the usage of trade between A and B, B might either keep or return the goods sent him by A. Goods were sent, February 19, and retained by B till March 4, on which day and the following one, being then insolvent, he returned them, and on March 5, after returning them, committed an act of bankruptcy. Held, the act of returning the goods was fraudulent and void, and the property vested in B's assignees.(1)

42. A purchased goods for B, and placed them in the custom-house in his own name. He also handed to B a bill of exchange as security; but, the bill proving to be forged, B required an immediate transfer of the goods to himself, which was accordingly made. Two days afterwards, A committed an act of bankruptcy. Held, this was not a voluntary preference, and the transfer was good.(2)

43. A debtor transferred goods to his creditor, at the request of the latter, in part-payment of a debt not yet due, and became bankrupt soon afterwards. Held, the facts did not conclusively show an unlawful preference.(3)

44. Where notes were given to a creditor as collateral security, and the debtor became a bankrupt on the following day; held, the assignment of the notes was void, and the assignee of the bankrupt might maintain *trover* to recover them. The transfer, on general principles, would be valid, but was held void as against the policy of the bankrupt law.(4)

45. A debtor, on the eve of bankruptcy, sent by mail to his creditor a bill of exchange, without the previous knowledge of the latter. Held, the act was a fraud on the bankrupt laws and void. It was said, that all acts done to defraud creditors, or against the public law of the land, such as the statutes of bankruptcy, are absolutely void.(5)

46. A trader, in contemplation of absconding, enclosed a bill to his creditor in discharge of the debt, saying, that he had the honor to show him that preference, which he thought his due.

(1) Neate v. Ball, 2 E. 117.

(2) De Tastet v. Carrol, 1 Stark. 88.

(3) Hartshorn v. Slodden, 2 B. & P. 582. 11 E. 256.

(4) Locke v. Winning, 3 Mass. 325.

(5) Alderson v. Temple, 4 Burr. 2235

The creditor, however, was not privy to this act. Before the bill could be received, the debtor committed an act of bankruptcy. Held, as the motive was to give a preference and the act incomplete, it was void.(1)*

SECTION III.—WHICH OF TWO PARTIES SHALL SUFFER BY THE FRAUD OF A THIRD.

1. In some cases of sale, the question arises, which of two parties, both innocent, shall suffer by the fraud of a third party, with whom they have dealt.(2)

2. This question is sometimes applicable to the case of a second purchaser, where the first one had himself an imperfect title. The rule is, in general, that one having no title can con-

(1) *Harman v. Fisher*, Cowp. 117.

(2) See 9 Mass. 55. 6 Mass. 428.

* Upon the same principle which renders void a *sale* of property made to the injury of creditors; the taking of property *by legal process*, as security for, or in satisfaction of, a fictitious debt, is void against bona fide creditors. In some of the states, this principle is affirmed, and forms of proceeding provided for enforcing it, by express statutes. It has also been held in Massachusetts, that where a debtor and a third person conspire to defraud a creditor, by means of an attachment by the latter upon the former's property, on a fictitious debt, and the creditor thereby fails of securing his debt, the debtor being insolvent, the creditor may have an action for a conspiracy against them. *Adams v. Paige*, 7 Pick. 542.

A transaction in the nature of a sale may be questioned as fraudulent in relation to *creditors of the vendee*, as well as those of the vendor. In other words, creditors of the vendee may seek to hold property, coming into his hands by a contract not amounting to a sale *between the parties*, on the ground that possession gives the vendee a false credit. But the property cannot be thus held, without proving actual fraud. Thus the plaintiff furnished one A, an insolvent, with goods, to be sold at a shop kept by A. A was to pay for them at certain prices, as fast as he sold them. Whatever he might obtain over those prices, was to be his profits. The goods were to remain the plaintiff's, and at his risk, until sold. Such articles as should not be sold were to be returned to the plaintiff; such as should be sold on credit, were to be at A's risk; and for all goods sold, he was to account with the plaintiff at the prices fixed. Held, that such a consignment was not fraudulent in law in respect to A's creditors, and that whether it was in fact *bona fide*, or only a color for a sale, was a question for the jury. *Patten v. Clark*, 5 Pick. 5.

vey none; but to this rule there are some exceptions. A second vendee acquires a title, (the first having none), only where he gives value or incurs responsibility on account of the goods, and has no notice. In such case, there being two innocent parties, the loss must fall on him who enabled the guilty party to commit the fraud.(1)

3. The rule, that where one of two innocent parties must suffer by the fraud of a third, he must bear the loss who confided in the fraudulent party, does not apply to the case of a mortgage of chattels, without change of possession, so as to throw the loss of a subsequent sale by the mortgagor upon the mortgagee instead of the purchaser. The rule would apply with the same force to any bailee of property.(2)

SECTION IV.—SALES VOID FOR ILLEGALITY, &c.

1. Contracts of sale, like all other agreements, are void, if contrary to the law of the land, whether it be the common law or express statutory provisions. And it seems to be now well settled, that where a statute imposes a penalty upon the doing of a certain act, any contract relating to the doing of such act is void, although there are no express words of prohibition in the statute. The principle is, that a court of justice cannot assist in enforcing contracts which the law of the land has interdicted either expressly or by implication.* Thus it has been held, that where by the general law a penalty is imposed upon any broker of a certain city who trades as principal; the law will not enforce a contract by which such penalty is incurred.(3) So where a statute provided, under a penalty, that all bricks sold

(1) *Root v. French*, 13 Wend. 572.

(2) *Lane v. Borland*, 2 Shepl. 77.

(3) *Carth.* 252. 1 Taun. 136. *Cro. Eliz.* 485. 10 Bing. 110. 9 B. & C. 192.

* A contrary doctrine seems to be favored by an early case, which decided, that a fair held on Sunday was good, though St. 27 Hen. 6, c. 5, imposed a penalty upon any person selling on that day. *Comyns v. Boyer*, *Cro. Eliz.* 485.

should be of certain dimensions; it was held that a seller of bricks not conforming to this measure, though selected by the purchaser, could not recover the price; this being the only method of effecting the purpose of the act, which was to guard the vendee against the fraud of the vendor.(1) So where the plaintiff was engaged in the management of an unlicensed theatre, it was held that he could not recover of the defendant money paid at his request for dresses of the dancers.(2) And if a statute prohibit the buying of pheasants, a sale of them passes no title.(3) So where a statute imposed a penalty for buying or selling corn by any other measure than the Winchester bushel; it was held that no action would lie for the non-delivery of two hobbots of barley.(3) So an action does not lie for the price of butter sold in firkins not marked according to law.(4)*

2. But it is said, that when the consideration of a contract and the act to be done are both legal; it seems, a plaintiff will not be prevented from recovering by an infringement of the law, not contemplated by the contract, in the performance of something to be done on his part. Thus a rectifier, who, contrary to St. 6 Geo. 4, ch. 8, sold spirits, without a permit expressing their true strength, was allowed to maintain a suit for the price.(5) So, a distinction has been taken, between statutes designed to protect the revenue only, and those intended to protect the public also; contracts made in violation of the former class being held void, but not those which violate the latter. Thus, where A, B, C, &c. carried on the distilling business, and C alone carried on the retailing of spirits within two miles of the distillery, contrary to St. 4 Geo. 4, ch. 94, and was not named as a partner in the excise book or licence, conformably to St. 6 Geo. 4, ch. 81; held, though the other partners

(1) *Law v. Hodson*, 11 E. 300. 8 T. R. 165. 2 B. & B. 265.

(2) *De Begnis v. Armistead*, 10 Bing. 107.

(3) *Tyson v. Thomas*. McClel. & Y. 119.

(4) *Forster v. Taylor*, 5 B. & Ad. 887.

(5) *Wetherell v. Jones*, 3 B. & Ad. 221.

* A contract to deliver *slaves* cannot be enforced in Massachusetts. *Greenwood v. Curtis*, 4 Mass. 93.

had knowledge of the above violations of the law by C, they might still recover the price of spirits sold, because these statutes were mere *revenue* regulations.(1) So, where a factor sold a quantity of prize-manufactured tobacco, consigned to him from Guernsey, making a regular entry of it, but not having entered his name with the excise officer on obtaining a license as a tobacco dealer, according to St. 29 Geo. 3, ch. 68; held, as the law was a mere revenue regulation, protected by a specific penalty, and contained no declaration that such a contract should be illegal; the seller might recover the price of the tobacco.(2) (The object of the statute was not to prevent the sale of tobacco, but to impose a penalty upon those who should sell without license; and this object would not be impeded by a recovery of the price from a purchaser.) So a sale of goods is not void, though the vendor knows they are to be applied to an illegal purpose, unless he has himself a share in the transaction. Thus, although he knows the goods are meant to be used in an unlawful trade and obtains permits for delivery to an agent.(3) So where a horse was lent to the defendant at a gaming table, and delivered by him to the winning party; held, the lender might recover the value of the horse, though loaned for the purpose of enabling the defendant to stake upon the game.(4)*

3. The further distinction has been taken, that where the parties to the contracts are subjects of the government whose law they agree to violate, such contract is void. And so, where a foreigner violates the law of England, he cannot recover the fruits of

(1) *Brown v. Duncan*, 10 B. & C. 98. 13 Pick. 518.

(2) *Johnson v. Hudson*, 11 E. 180.

(3) *Hodgson v. Temple*, 1 Marsh. 5. 5 Taunt. 181.

(4) *Carsan v. Rambert*, 2 Bay. 560.

* Where goods are bought from an enemy even in his own territory by a citizen of the United States, and sold here; the sale is valid, and the price may be recovered, although the vendor might be chargeable with a misdemeanor, and the property liable as prize. *Coolidge v. Inglee*, 13 Mass. 26. Where the defendant (during a war with Great Britain, gave his note) in consideration of receiving a British license which had been procured by the plaintiff without any unlawful intercourse with the enemy, and was sold to the defendant as a protection against the British; held, the transaction was neither immoral nor illegal, and the note was binding. *Ib.*

his own illegal act. Thus if he takes an actual part in an unlawful adventure, as, for instance, by packing goods in an unlawful manner, he cannot recover the price. But it is otherwise, where he merely has knowledge that his vendee intends to use the goods in violation of the revenue laws. Such future use is no part of the contract, and the unlawful intention may be abandoned.(1)

4. The following additional cases illustrate the principles and distinctions above stated.

5. A agreed to sell B Russian hemp, the ship to sail from St. Petersburg by a certain day. An English statute prohibited any person from trading with Russia, unless belonging to a certain association of merchants. A, being the importer, but not a member of this association, used the name of a member at the landing-scale and in the docks. In an action by A against B for the price, held, to be questionable, whether the action could be maintained, or whether B was bound to accept an article which would be immediately liable to seizure.(2)

6. One of the plaintiffs, residing in Guernsey, and a partner with the others, who lived in England, received an order from the defendant, of Cornwall, for a quantity of brandy. The defendant directed that the brandy should be delivered to the master of a smuggling vessel, and some of it was delivered at Guernsey and the rest at sea. The whole was put into *half-ankers*, by the partner at Guernsey, and ready slung for smuggling, but it was brought to England at the defendant's cost. Held, an action would not lie for the price.(3)

7. So a bill of exchange, given for ankers of gin and brandy, which were shipped by the plaintiff, and delivered on board a ship by order of the defendant; was held to be void.(4)

8. The plaintiff, a foreigner, living at Lisle, sold the defendant, an Englishman in England, a quantity of lace, knowing it was to be smuggled, and packed it in a peculiar manner, suitable

(1) *Pellecat v. Angell*, 2 Cr. M. & R. 311.

(2) *Gross v. La Page*, Holt, 105.

(3) *Biggs v. Lawrence*, 3 T. R. 454.

(4) *Clugas v. Penaluna*, 4 T. R. 466.

for this purpose, by order of the defendant. Held, no action would lie for the price.(1)*

9. An English Statute of Geo. 1, declares void all contracts made by English subjects, for loading any ship in the service of foreigners with a cargo to trade to the East Indies. The plaintiffs sold the defendant certain goods, to be shipped by the defendant in London for Ostend, and thence carried by other vessels to India. Held, the plaintiffs not merely aided, but acted as principals, in violating the above act, and a bond given for the price was void.(2)

10. A ship was purchased by A, an Englishman, from B, an American, but continued to be registered as American. She was captured by a French privateer, condemned, and sold to C. Held, A could not maintain trover against C, the transaction being in fraud of the law and policy of the United States.(3)

11. A, as agent of B, in pursuance of an agreement between them, and in violation of an existing embargo, exported from the United States to New Brunswick, goods belonging to B, thence in an English ship to the British West Indies; there sold them, and remitted the proceeds in money and produce of the islands to B in the United States. A brings an action against B for an account. Held, it could not be sustained, there having been one entire and illegal voyage.(4)

12. A Statute of Geo. 3 forbids brewers to use any thing but malt and hops in the brewing of beer. The plaintiff, a druggist, sold the defendant, a brewer, a quantity of Spanish juice, isinglass and other articles, knowing that they were to be used in brewing. Held, this sale fell directly within the words of the Statute "*causing or procuring* any ingredients to be used," &c. and no action would lie for the price.(5)

(1) Waymell v. Reed, 5 T. R. 599.

(2) Lightfoot v. Tenant, 1 B. & P. 551.

(3) Duncanson v. McLure, 4 Dall. 308.

(4) Sturges v. Bush, 5 Day. 452.

(5) Langton v. Hughes, 1 M. & S 593. 3 B. & A. 185.

* It has been held in Pennsylvania, that where smuggled goods are sold, the purchaser is not liable for the price, unless perhaps he has knowledge of all the facts, and agrees to run all risk. Condon v. Walker, 1 Yeates, 483.

13. The plaintiff sold a quantity of ribbons, knowing they were to be distributed among voters. Such distribution being contrary to law, held, he could not recover the price of them.(1)

14. A, living in Baltimore, gave to B a power of attorney to sell personal property in New Orleans. B accordingly sold certain slaves, but not conformably to the laws of Louisiana. C, an adverse claimant, afterwards recovered the slaves from the purchaser, who brings an action for indemnity against A. B had not paid over the price, but had become insolvent. Held, the action did not lie, because the sale was not conformable to the laws of Louisiana. The purchaser was bound to see that B conformed to his powers; and he must have had full knowledge of the facts which invalidated his title. A could not be presumed to have authorized a violation of the laws.(2)

15. A and B employed C to sell for them on commission tickets in an unauthorized lottery, C to be considered the purchaser of all tickets not sold or returned by a certain day. C brings an action for a prize drawn by one of his tickets. Held, though the *purchase* of tickets by C was not illegal, yet as the agreement concerning such purchase was part of an entire illegal contract, the whole was void. The statute having imposed a penalty upon the act of selling, such sale was by implication prohibited and rendered illegal; and although, if there had merely been a sale by the defendants to the plaintiff, as only the sale, not the purchase was forbidden, the rule of *in pari delicto* would not apply, and the plaintiff might recover a prize, while the defendants could not recover the price of a ticket; yet, the plaintiff being *an agent to sell*, this maxim was applicable, and a bar to the action.(3)*

(1) Bayntun v. Cattle, 1 M. & Rob. 265.

(2) Owings v. Hull, 9 Pet. 607.

(3) Roby v. West, 4 N. H. 285.

* An agreement to sell tickets in the lottery of another state not authorized by the laws of New York, is against the policy of the New York statute, and void. Hunt v. Knickerbocker, 5 John. 327. A statute of Connecticut prohibited the sale in that state of tickets issued under authority of any other state. Held, it applied to those issued under authority of the United States. Terry v. Olcott, 4 Conn. 442. In Pennsylvania, no action lies to recover the price of a ticket in an unauthorized lottery. Nor to recover the amount of prizes drawn to a ticket bought after the time limited for

16. The plaintiff, residing at Dunkirk, sold a quantity of tea to the defendant, knowing it was to be smuggled into England, though having himself no agency in the smuggling. Held, an action would lie for the price of the tea. It would be otherwise if the tea had been sold to be delivered in England.(1)

17. It has been held in Maine, that the Statute of 1821, ch. 160, to prevent fraud in firewood, bark, &c. does not have the effect of avoiding a sale of cord-wood less than four feet in length. The act merely fixes the dimensions of a cord, and has no other object. But in Massachusetts, the Statute of 1821, ch. 158, providing that no shingles be offered for sale, unless they conform to specified dimensions, renders the sale of any others void.(2)

18. Contracts of sale, which are contrary to morality or religion, or in violation of the order and welfare of society; are void. Thus one cannot recover the price of immoral, obscene or libellous caricatures, from a person who gave a general order for all prints of that description ever published; or the price of clothes sold to a prostitute, to promote the success of her employment, and under the expectation of being paid from the profits. Otherwise, if the vendor merely had knowledge of such person's criminal course of life. A sale is not void, merely because it tends to promote immoral purposes, unless made with this express object.(3)

19. So, contracts of sale which are against *public policy* cannot be enforced. Thus a sale, or contract for the sale, of a public office, unless expressly by law made saleable, is void. So

(1) Holman v. Johnson, Cowp. 341. 5 Taun. 182.

(2) Coombs v. Emery, 2 Shepl. 404. Wheeler v. Russell, 17 Mass. 258.

(3) 11 Wheat. 258. 4 Esp. 97. 5 B. & C. 173. 2 C. & P. 347. Brown, No. 163. Story, Confl. of L. 258.

purchasing. Primer v. McConnell, 6 Binn. 329. 2 Browne, 48. 4 S. & R. 151. 2 Whart. 155. Biddis v. James, 6 Binn. 321. In Massachusetts, an indenture, containing an agreement to furnish money for the purpose of "carrying on the general business of brokerage, embracing, as time and opportunity shall give, the vending of lottery tickets, is on the face of it illegal. Williams v. Woodman, 8 Pick. 78. (See s. 21.)

the sale of the pay of an officer or soldier, or the prize-money of a sailor, or of the office of deputy sheriff or constable, or any other office of trust concerning the administration of justice. So a sale of the office of clerk of a Court is void. But the objection that a contract is against public policy must be clearly made out, in order to be available. (1)

20. The owner of a ship in employ of the East India Company, without the knowledge of the company, sold the command of her. Held, no action would lie on the agreement, it being against the regulations, and in fraud, of the company, and contrary to public policy. (2)

21. A vendor is bound to know that he actually has the thing which he pretends to sell. And though both parties know it to be subject to a contingency which may immediately destroy it, yet, if the contingency has actually happened, the sale is void. (3)

22. Upon a similar principle, in case of a sale of goods, to be delivered at a future time; if the vendor neither has at the time, nor has contracted for the goods, nor has any reasonable expectation of receiving them by consignment, but intends to go into the market and purchase them; no action will lie for non-performance of the contract. The transaction amounts to a wager on the price, and is of mischievous tendency. This principle was applied to a suit brought against a broker, for his negligence in the sale of nutmegs for the plaintiff. The broker sold to a minor, who was unable to pay. Held, the suit could not be sustained. (4)

23. An agreement to deliver a certain amount of 6 per cent. stock at a future time, for a certain price, is a lawful contract. So, an agreement to transfer stock *in futuro*, the vendee advancing money, with no intent to transfer it, but merely for speculation, is not void. Though the vendor own stock at the time, and afterwards, but before the day fixed for delivery, sell

(1) Cowp. 39. 8 T. R. 89. 2 B. & C. 661. 3 T. R. 681. 4. 248. 2 Bing. 242. Dutton v. Rodes, 3 Marsh. 433. Carleton v. Whitcher, 5 N. H. 196. Meredith v. Ladd, 2 N. H. 517. Cardigan v. Page, 6. 183. See 9 Wend. 175. Haralson v. Dickens, 2 Car. Law Repy. 66.

(2) Blachford v. Preston, 8 T. R. 89.

(3) Allen v. Hammond, 11 Pet. 63.

(4) Bryan v. Lewis, Ryan & M. 386.

a part of it, the statute of New York is inapplicable. It avoids a sale, only when the vendor does not own stock at the time of sale.(1)

24. A seller of lottery tickets may legally sell them after the drawing, if ignorant of the result.(2) (See ante 15 & n.)

25. Where part of the consideration of a sale is illegal, the whole transaction is void.(3)

26. The plaintiff cut logs upon the land of another person, without license, and sold them on credit to the defendant, who had notice of the facts, the defendant agreeing to take them, subject to the claim of the owner. In a suit for the price, held there was no good defence on the ground of want or illegality of consideration.(4)

27. At common law, a sale is not invalid because made on Sunday. St. 29 Car. 2, c. 7, declared void all sales made by persons *in their ordinary calling* on that day. But where one party was ignorant that the other made the contract *in his ordinary calling*, the former is not deprived of his right of action. And a subsequent promise to pay for an article thus unlawfully sold, will sustain an action upon a "quan. mer."(5)

(1) Gilchreest v. Pollock, 2 Yeates, 18. Frost v. Clarkson, 7 Cow. 24.

(2) Bishop v. Williamson, 2 Fairf. 495.

(3) Carleton v. Witcher, 5 N. H. 196.

(4) Baker v. Page, 2 Fairf. 381.

(5) 1 Taun. 131. 7 B. & C. 96. 597. 6 Bing. 653. 1 Cr. & J. 180.

CHAPTER XII.

REMEDIES IN CASE OF SALE,—FORMS OF ACTION, DEFENCES, EVIDENCE, DAMAGES, &c.

SECTION I.—NECESSITY OF A DEMAND OR TENDER.

SECTION II.—ACTION FOR GOODS SOLD AND DELIVERED.

2. *Express promise and agreed price unnecessary.*
3. *Security given, which proves of no value.*
4. *Goods received by the defendant—promise implied.*
7. *But there must be a sale.*
15. *Goods not received by the vendee.*
17. *Sale incomplete—the action does not lie.*
19. *Goods not deliverable without payment—no action till delivery.*
22. *Special contract—disaffirmed—an action lies.*
33. *Rule of practice ; inspection of goods.*

SECTION III.—ACTION FOR GOODS BARGAINED AND SOLD.

1. *Where it lies, in general.*
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SECTION IV.—ACTION FOR MONEY HAD AND RECEIVED.

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SECTION V.—FORMS OF DECLARING IN ACTIONS UPON THE CONTRACT OF SALE.

1. *Non-delivery of goods sold.*
2. *Warranty of title.*
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- 4 *Performance of condition by the plaintiff.*
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SECTION VI.—VARIANCE BETWEEN AVERMENTS AND PROOFS.

1. *In relation to the parties.*
6. *In relation to the property sold.*
13. *The price.*
16. *Performance of condition.*
17. *Alternative contract.*

SECTION VII.—DEFENCES.

SECTION VIII.—AMOUNT OF DAMAGES.

SECTION I.—NECESSITY OF A DEMAND OR TENDER.

(See Section V.)

1. The question sometimes arises, whether a previous demand or tender is necessary to sustain an action upon the contract of sale.

2. A sold and delivered to B a quantity of wheat, B agreeing to pay him therefor such quantity of flour as the wheat should be worth, upon request. In a suit against B upon the contract, held, A must aver and prove a special demand for the flour, before suit commenced.(1)*

(1) Ewing v. French, 1 Blac. 170.

* So, in an action on a note payable in specific articles on demand, the plaintiff

3. An action lies for the non-delivery of goods, though no demand be made for them till after the time appointed for payment, unless there have been unreasonable delay, or proof of inability or refusal on demand to pay for them.(1)

4. The defendant, in consideration of the plaintiff's buying a quantity of hay from him, promised the plaintiff to deliver the hay and suffer the plaintiff to take it away as wanted, *when requested*. The declaration alleged, that the defendant, after suffering the plaintiff to take a part of the hay, sold the remainder of it to other persons; but no request for delivery. Held sufficient.(2)

5. A agrees to buy, and B to sell goods, at a certain price, and to be delivered between certain days. In an action for non-delivery, the plaintiff need not aver a tender and refusal of the price, but only that he was during the whole time and still is ready and willing to receive and pay for the goods.(3)

SECTION II.—ACTION FOR GOODS SOLD AND DELIVERED.

1. The ordinary action to recover the price of goods sold, is *indebitatus assumpsit* for goods sold and delivered.

2. To sustain an action for goods sold and delivered, it is not necessary to prove an express promise to pay. The ordering of an article, or bidding for it at auction, includes a promise to pay, if it be actually obtained by the vendee. The transaction is itself a promise, rather than something from which a promise is inferred. And, if matter of inference, the question is for the jury, not for the court.(4) So this action lies, though no price were agreed upon.(5)

(1) *Dox v. Dey*, 3 Wend. 356.

(2) *Bowdell v. Parsons*, 10 E. 359.

(3) *Waterhouse v. Skinner*, 2 B. & P. 447.

(4) *Adams v. Steamboat Co.*, 3 Whart. 75. *Dutton v. Solomonson*, 3 B. & P. 585.

(5) *Jenkins v. Richardson*, 6 J. J. Mar. 441. *Snodgrass v. Broadwell*, 2 Litt. 355.

3. Where there is a subsisting debt for the sale of goods, and time is given for payment upon the vendee's giving notes for the price, which prove to be of no value; an action lies for goods sold and delivered.(1) (See *infra*, 8, 26.)

4. Where the defendant is proved to have received and used the goods in question; this is *prima facie* evidence to sustain an action for goods sold, &c.* Thus, A agreed to find materials and build a chimney for B, and, if he did not build a good one, was to have no pay. The work was done, but so badly, that B was obliged to take down and rebuild the chimney, using, however, the old materials. Held, A might recover of him the value of such materials.(2)

5. The plaintiff sent goods to the defendant abroad, upon the order of certain merchants in London, and the defendant received and used them. Held, this was *prima facie*, though slight evidence, to sustain an action for goods sold and delivered.(3)

6. The plaintiff, a book-publisher, having for a long time furnished to one A a periodical publication, after the death of A, of which the plaintiff was ignorant, continued to forward the work by stage, directed to A, as before. The defendant, who succeeded to the property of A, received the numbers, as they were sent, and never offered to return them. Held, although

(1) *Stedman v. Gooch*, 1 Esp. 5. (See *Puckford v. Maxwell*, 6 T. R. 52. *Owen v. Morse*, 7 T. R. 64.)

(2) *Elliott v. Wilkinson*, 8 Yerg. 411.

(3) *Bennett v. Henderson*, 2 Stark. 550.

* Where goods are delivered to A on the credit or request of B, an action for goods sold, &c. lies against B. *Stapp v. Anderson*, 1 Marsh. 539. *Bickham v. Irwin*, 3 Yeates, 66. But a special action only will lie, where B merely guarantees payment by A. So where A sold and delivered goods to B, under a verbal agreement with C that C should pay if B did not; and C having paid A, brings an action against B in A's name; held, it would not lie. *Barnes v. Blackiston*, 2 Har. & J. 376. *Indeb. assump.* lies for necessities furnished to a wife, child or slave. 13 John. 480. 14. 188. 5 Wend. 558. 16 Mass. 31. So, against one who promised to pay for necessities furnished to a *feme covert* and her children, though the husband lived in the state, and the defendant was under no prior obligation to provide for the wife, &c. *Lanier v. Harwell*, 6 Munf. 79.

the plaintiff had no knowledge of the defendant as purchaser, an action for goods sold and delivered would lie against him.(1)*

7. In order to sustain an action for goods sold and delivered, there must have been a *sale* from the plaintiff to the defendant. Hence, where the plaintiff declared in this form, and the evidence proved, that the defendant had received the goods from him under an authority to dispose of them in a certain way, and had disposed of them in a different way; held a fatal variance. So, proof that the plaintiff had consigned goods to the defendant for sale, and that part of them had been sold by the defendant, does not support this count.(2)†

8. Goods were sold by A to B, to be paid for by a bill of exchange drawn by C upon D, without recourse to B in case of non-payment. B knew that the bill was of no value. Held, A could not maintain *indebitatus assumpsit* against B for the price of the goods. His remedy must be an action of *trover* or deceit. The goods were in effect to be *bartered* for the bill of exchange.(3) (See *supra*, 3. *infra*, 26.)

9. The plaintiff sold to the defendant a quantity of beer in casks, and gave him notice that unless he returned the casks in a fortnight, he should be regarded as having purchased them. The casks not being returned, the plaintiff brings an action as for goods sold and delivered. Held, he could not recover in

(1) *Weatherby v. Banham*, 5 C. & P. 228.

(2) *Shepard v. Palmer*, 6 Conn. 95. *Colman v. Price*, 1 Blackf. 303.

(3) *Read v. Hutchinson*, 3 Camp. 352.

* Where one duly authorized buys goods for another, who receives and has the benefit of them, the vendor may sue the latter for the price, though he have paid the former; unless the vendor has done some act to discharge him. *Emerson v. Providence, &c.* 12 Mass. 237. So, if A, without authority, buy goods as the agent of B, who receives them, B is liable to the vendor, unless he has paid A. *Kupfer v. Inhts., &c.* 12 Mass. 185. But where A agreed with B, that B should do work for him, and find materials, which B accordingly bought from C in his own name, and used for A's benefit, and A paid B for them; held, A was not liable to C. *Clark v. Imlay*, 7 Halst. 119.

† A was employed by B to sell goods on commission. A sold some of them, receiving part of the price, which he entrusted, with the remaining goods, to C, his clerk, who absconded with the money and goods. B brings *assumpsit* for goods sold, &c. against A. Held, the action would not lie. *Read v. Bertrand*, 4 Wash. C. 514.

this form, but must declare upon the special agreement, arising out of the above notice.(1) (See *Goods bargained and sold.*)

10. The plaintiff issued the following advertisement—"the public, &c. served with new clothes at the following low rates per annum, on return of those left off" The defendant having contracted with him for four suits in a year and return of the old ones, or for *the use or wear and tear* of four suits *per annum*; held, the plaintiff could not recover in a count for goods sold and delivered, but must declare upon the special contract. It seems, this contract included an obligation to mend, which therefore could not be made the subject of a distinct charge.(2)

11. Agreement between A and B, that A shall labor for B, and receive payment in goods. A part of the labor was done after delivery of the goods. B brings an action for goods sold, &c. and A files no account in offset. Held, the action did not lie, the goods not being sold, but delivered in payment of a debt.(3)

12. A agreed with B, to cut on B's land, and draw and deliver to him, a quantity of spars; which he accordingly did cut, and one C delivered them to B, and received the money. Held, A could not maintain an action for goods sold and delivered against C.(4)

13. The defendant having agreed with one A to take goods of him, to be manufactured for A by the plaintiff; the plaintiff sent goods to the defendant, who credited them to A, and on subsequent settlement accounted for them with him. The plaintiff, though seasonably advised of the credit given B, did not notify the defendant till after the settlement, that the goods were delivered on account of the defendant and not of A. The plaintiff brings an action for goods sold and delivered against the defendant. Held, the action would not lie.(5)

14. In general, where there is a contract for *exchange*, and one party brings a suit against the other for non-delivery ac-

(1) Lyons v. Barnes, 2 Stark. 39.

(2) Rees v. Manners, 3 Smith, 119.

(3) Wilby v. Harris, 13 Mass. 496.

(4) Weed v. Butterfield, 1 Chip. 161.

(5) Farwell v. Smith, 12 Pick. 83.

cording to agreement; the contract must be specially set forth in the declaration. But where A agrees to give a horse, warranted sound, in exchange for a horse of B and a sum of money, and the exchange takes place, but B refuses to pay the money; A may have an action for goods sold and delivered against him.(1)* (See *infra*, 22.)

15. Where goods sold are sent to the vendee, but he fails to receive them through his own neglect, this action lies against him.

16. In November 1802, A ordered goods from B at London, writing to him to send them by any conveyance which would reach Bristol, as he (A) lived only six miles from thence; and to inform him when they were sent, that he might know when to expect them. B sent the goods to the wharf at which Bristol vessels lay, took a receipt for them to go by *the Commerce*, and notified A accordingly. The *Commerce* sailed in January 1803, but, being fully loaded, the goods did not go by her, but were afterwards carried by another vessel, *the Nancy*, which sailed in April. The usage at the wharf was, to give a receipt for goods, as if to be sent by vessels then loading, whether a full freight had been already taken or not; and if it had, to send them by the next vessel. The *Commerce* having arrived without bringing the goods, A made no further inquiries for them. B also was ignorant that they went by another vessel, till in the middle of the year 1804 he demanded payment, and A wrote that he had not received them. B then informed A how they

(1) *Sheldon v. Cox*, 3 B. & C. 420.

* General indeb. assump. lies to recover the value of goods sold and delivered, where the plaintiff agreed to receive specific articles in payment, but the defendant has broken his contract to deliver them. *Baylies v. Fettyplace*, 7 Mass. 329. So, where goods have been delivered in part execution of a special contract, which is rescinded by mutual consent. *Goodrich v. Laffin*, 1 Pick. 57. Thus where A and B mutually agree to deliver goods to each other, and A, having in part performed the agreement, brings an action for the value of the goods delivered, and recovers; B may do the same. *Ib.* Where one contracts to do certain work and find the materials, and proceeds in fulfilling his agreement with an honest intention of conforming thereto, but not in the precise manner contracted for; he may recover upon a *quan. mer.* so much of the agreed price, as remains after deducting the diminution of value caused by the deviations. *Hayward v. Leonard*, 7 Pick. 181.

were sent. Held B could sustain a suit for goods sold and delivered. The risk was A's, and the wharfinger was his agent, not B's. A was guilty of gross negligence.(1)

17. But the action does not lie, where a sale is incomplete, notwithstanding a previous tender of the goods by the vendor.

18. A agreed with B to deposit with C a certain sum of money, as B's price for a horse, which C was thereupon to deliver to A; B to use the horse in the mean time. B, having tendered the horse and demanded the money left with C, brings an action for goods sold, &c. Held, the sale was incomplete, and the plaintiff could not recover.(2)*

19. Where the vendor has manifested his determination not to deliver the goods without payment, he cannot maintain an action for goods sold and delivered until actual delivery.

20. Thus, where goods are sold for cash, and packed in boxes of the purchaser for him and in his presence, but not removed from the vendor's premises, nor paid for; the latter cannot maintain an action as for goods sold and delivered, although the facts may show a sufficient *acceptance* by the purchaser to take the case out of the Statute of Frauds. The boxes cannot be considered the defendant's warehouse, nor did the plaintiff ever intend, by packing the boxes, which were to remain in his own custody, on his own premises, to give up the goods without payment.(3)

21. A agreed to sell goods to B, who paid a shilling as earnest money. The goods were packed in cloths supplied by B, and deposited in a building of A's, till B should send for them; but A at the same time declared that they should not be taken away without payment. Held, there was no delivery of the goods, and an action for goods sold and delivered did not lie.(4)

(1) Cooke v. Ludlow, 2 N. R. 119.

(2) Branson v. Gales, 3 Murph. 312.

(3) Boulter v. Arnott, 1 Cromp. & Mees. 333.

(4) Goodall v. Skelton, 2 Hen. Bl. 316.

* When a mechanic has made an article according to contract, and tendered it, and, on the customer's refusing to accept and pay for it, has left it with a third person, giving notice to the customer; he may immediately bring an action to recover the agreed price. Bement v. Smith, 15 Wend. 493.

22. Where the sale is founded on a special contract, upon which alone an action could otherwise be sustained, this contract may be disaffirmed by some act of the vendee, and thereupon an action for goods sold and delivered sustained against him, though the contract has been only in part performed. (See *supra*, 14.)

23. Agreement to buy a lot of trees for a certain sum, and pay for them according to certain conditions. The conditions contained a proviso, that on non-payment of the price or a part thereof according to the conditions, the vendor might retain or retake the timber. The vendee cut and carried away a part without paying for them, and refused to pay till delivery of the rest. Held, the entirety of the contract was disaffirmed by the vendee, and an action might be sustained, as for goods sold and delivered, for the price of the trees actually taken; a count on the special contract being unsupported, by reason of a variance in alleging an auction sale instead of a private one.(1)

24. Sale at auction, payment to be made by an approved note at six months. The goods were delivered, but the vendee refused to give a note. The vendor brings an action for goods sold, &c. Held, the condition of the sale having been broken by the defendant, the plaintiff might treat it as absolute, and the action would lie.(2)

25. Sale and delivery of goods. The vendee afterwards gave his note on time for the price, with the agreement that unless one A would say that the vendee was able to pay the note when due, the vendor should have an immediate claim for the debt. A having refused to make this statement, held, the vendor might immediately bring an action for goods sold, &c.(3)

26. If a vendor of goods receive a *chose in action* as collateral security for the price, but realize nothing from it, he may bring this action, and need not sue upon the special contract.(4) (See *supra*, 3. 8.)

27. A sold to B the note of a corporation, together with two

(1) *Bragg v. Cole*, 6 Moo. 114.

(2) *Corlies v. Gardner*, 2 Hall, 345.

(3) *Clark v. Smith*, 9 Conn. 379.

(4) *Leas v. James*, 10 S. & R. 307.

shares of the stock, for which he was to be paid in whiskey. A knew the company to be insolvent, but represented it as responsible. B gave A his notes or contracts to deliver the whiskey, which was accordingly delivered; but, on ascertaining the company's insolvency, he offered to return the note and shares, and now brings an action for goods sold and delivered, to recover the value of the whiskey. Held, the action would lie, the special contract as to the method of paying for the whiskey being vitiated by the fraud of A.(1)

28. A buys goods of B, transferring to him the note of C, and guaranteeing payment of it. Upon non-payment of the note at maturity, B may bring an action against A for goods sold, &c.(2)

29. Where a vendee reserves the right of paying for the goods in specific articles within a certain time, he may do it within such time, without any demand or designation; and, if he does not, the vendor may bring an action for the price without a previous demand.(3)

30. The following cases seem somewhat repugnant to those above cited.

31. A and B make an exchange of goods. A having practised a fraud, B rescinds the bargain, calls on A to come and receive back the property which he (A) had given in exchange, and brings indeb. assump. for the value of his own goods. Held, the action did not lie without an actual return of the goods.(4)

32. Sale at auction, on condition that purchasers of not less than a certain amount, should have twelve months' credit, giving bond with surety; and that those who did not comply with these terms, should pay one fifth of the price for disappointing the sale, and return the goods before sunset. The defendant bought a horse, which was delivered, but no bond given. He kept the horse some days, and then offered to return, but the plain-

(1) *Pierce v. Drake*, 15 John. 475.

(2) *Butler v. Haight*, 8 Wend. 535.

(3) *Way v. Wakefield*, 7 Verm. 223.

(4) *Norton v. Young*, 3 Greenl. 30. 4 Mass. 505.

tiff would not receive him. Held, indeb. assump. would not lie for the price, till after twelve months had expired.(1)

33. In an action for goods sold and delivered, the Court will not compel the defendant to allow an inspection of the goods, for the purpose of enabling the plaintiff to identify them. There is no instance of the Courts ordering such a proceeding, unless the thing to be inspected belongs to both parties alike; as in case of a written agreement. The plaintiff may demand of the defendant to allow an inspection by his (the plaintiff's) witnesses, and may avail himself in evidence of the defendant's refusal. But the principle does not require a defendant to give evidence out of his own hands, which will injuriously affect himself. The Court may always impose terms upon the plaintiff, but not upon the defendant, except as the condition of granting a favor asked by him. The plaintiff's relief, in the present case, if any, is in Equity.(2)

SECTION III.—ACTION FOR GOODS BARGAINED AND SOLD.

1. Similar to the action for goods sold and delivered, is that for goods *bargained and sold*. The latter is usually brought, where the former does not lie for want of a delivery or acceptance.

2. The action for goods bargained and sold does not lie, unless there was an actual sale of goods in existence at the time, or a specific appropriation of goods, afterwards assented to by the vendee.(3)

3. This count can be sustained, only where the property has passed to the vendee, so that he might bring *trover*, and must bear the loss in case of theft or fire.(4) The distinctions in the various cases on this subject are said *to run extremely fine*.(5)

(1) Thompson v. Morris, 2 Murph. 248.

(2) Dell v. Taylor, 6 D. & R. 388.

(3) Atkinson v. Bell, 2 M. & R. 292.

(4) Per Tindal, Ch. J., Elliott v. Pybus, 10 Bing. 516

(5) Alexander v. Gardner, 1 Scott, 640.

4. Where a vendee refuses to take the goods, upon the ground that they are damaged, when in fact they are not, an action for goods bargained and sold lies against him. And the measure of damages is the value of the goods.(1)

5. Where one sells from a large parcel of goods, and it is at his option to select a part for the purchaser, no suit lies for goods bargained and sold, till such selection is made. Upon appropriation of a particular portion for the vendee, the property passes, subject to the vendor's lien for the price.(2)

6. Whether the action for goods bargained and sold will lie, where the goods have been re-sold upon the vendee's refusal to accept them, is a point on which there seems to be some conflict of authorities. In one case it is said that it will not, because by the re-sale, the vendor loses his right of requiring the first vendee to take the goods. He treats them as not belonging to such vendee, and the contract as not completed. Hence, he can recover only in an action for breach of the contract.(3)

7. So, where it is agreed between the vendor and vendee, that if the latter does not take the goods within a certain time, the former may rescind the sale, and the vendee does not take them within the period mentioned, and the vendor then re-sells the goods; it seems, he cannot maintain an action as for goods bargained and sold.(4)

8. But where a purchaser of goods at auction fails to take them away, and the vendor re-sells them at a loss, it has been held, that an action for goods bargained and sold lies, although the vendor has not the property to deliver, in case of a verdict in his favor. After such verdict, the defendant may maintain *trover* for the goods. He became a *buyer*, when they were knocked down to him at the auction.(5)

9. The action has been held to lie upon a contract of *sale or return*.

(1) *Hankey v. Smith*, Peake, 42 n.

(2) Per Bayley, J., *Rohde v. Thwaites*, 6 B. & C. 392.

(3) *Acebal v. Levy*, 4 Moo. & Sc. 217. 10 Bing. 384. *Hore v. Milner*, Peake, 42 a.

(4) *Hagedorn v. Laing*, 6 Taun. 162.

(5) *Mertens v. Adcock*, 4 Esp. 251.

10. The plaintiff furnished goods to the defendant on a contract of sale or return within one year. The goods not being returned within the time mentioned, held, the plaintiff might recover the price in a count for goods bargained and sold, and that no special declaration was necessary.(1) (See goods sold and delivered, 9.)

11. This action does not lie, without privity of contract between the plaintiff and defendant.

12. A having a patent for certain spinning machinery, B ordered from him a number of spinning frames, to be manufactured by A, and the latter employed C to make them, and informed B accordingly. The work having been completed, A ordered a certain alteration, which was made; the articles were packed in boxes for B; and C informed B that they were ready for delivery; but B refused to accept them. Held, C could not maintain the action for goods bargained and sold, nor for work done and materials found, against B.(2)*

SECTION IV.—ACTION FOR MONEY HAD AND RECEIVED.

1. It is held in Connecticut, that assumpsit for money had and received does not lie to recover the price paid by a vendee, unless the thing sold is of no value.(3)

2. Where one man sells the property of others, with full no-

(1) *Harrison v. Allen*, 9 Moore, 28. 2 Bing. 4.

(2) *Atkinson v. Bell*, 8 B. & C. 277.

(3) *Dean v. Mason*, 4 Conn. 428.

* It was remarked by the Court, that where you employ one to build a house on your land, or make a chattel with your materials, the party doing the work cannot appropriate the produce of the labor and materials to any other person. He may maintain an action against you for the work. But if you employ one to work upon his own materials, he has the right of applying the produce to another person. During the progress of the work, he cannot maintain an action; but when the work is completed and accepted, the party employed may have an action for goods sold and delivered, or, in case of non-acceptance, a special action on the case. But he cannot have an action for work and labor, because it was done upon his own materials and for himself, not for his employer.

tice that he is doing wrong, and disposing of that to which he has no title, he is liable to an action for money had and received.(1)

3. A tortiously took a quantity of coal from the land of B, sold it, received the money, and afterwards died. Held, B might maintain an action for money had and received against the administrator, though no direct evidence was offered of the sum that had been received, if the jury believed the fact of a sale. The judgment was founded upon the consideration, that the estate of A was increased to the amount of the value of the coal taken.(2)*

4. A sale of goods, procured by fraud, does not change the property in them. Hence, where the defendant fraudulently colluded with A, an insolvent, to procure wines from the plaintiff, the proceeds of which finally came to the defendant's hands, for a prior debt due him from A; held, the plaintiff might maintain an action for money had and received against the defendant. A knew that the defendant would ultimately have the proceeds of the wines, and stood as the defendant's agent. And it was held to make no difference whether the property was actually converted into money or not.(3)

5. A, having obtained possession of goods entrusted to B, to

(1) *Hardacre v. Stewart*, 5 Esp. 103.

(2) *Powell v. Rees*, 7 Adol. & El. 426.

(3) *Abbotts v. Barry*, 5 Moo. 98.

* It has been held in Massachusetts, that where trees are unlawfully cut and carried away, the owner cannot waive the tort and sue as for *goods sold and delivered*, unless the defendant has sold the trees. *Jones v. Hoar*, 5 Pick. 285. But where one tenant in common sells trees from the land, the other may have an action for *money had and received*, whether payment was made in land, by note, or otherwise. *Miller v. Miller*, 7. 133. So where A without authority sells the goods of B, taking a negotiable note for the price; B may have this action against him, *Whitwell v. Vincent*, 4. 449. One disseised cannot, during the disseisin, maintain *assumpsit* for the proceeds of trees cut upon the land and sold. *Bigelow v. Jones*, 10. 161. Where one wrongfully takes the chattel of another, manufactures it into a new form, sells and receives the price for it; he is liable to the owner as for money had and received, *Gilmore v. Wilbur*, 12 Pick. 120. In New Hampshire, it has been held, that where one took the goods of another, and converted them to his own use, without the owner's license; upon an agreed statement of facts, the tort might be waived, and *assumpsit* supported for the price, though it was agreed there was no contract. *Hill v. Davi*, 3 N. H. 384.

be sold at a certain price, refused to re-deliver them or pay the price at the time appointed. B, under threat of a suit by the owner, paid him for the goods. Held, B might recover against A in an action for money had and received, a sale of the goods by A being presumed.(1)

6. Where two persons make a valid agreement to join in the purchase of goods for the purpose of selling them again; if one of them take and appropriate to himself the whole of the property; the other may bring an action for money had and received for his share of the profits.(2)*

SECTION V.—FORMS OF DECLARING, IN ACTIONS UPON THE CONTRACT OF SALE. (See Sect. I.)

1. In an action for non-delivery of goods sold, the declaration need set forth only that part of the contract, a breach of which is complained of.(3)†

(1) Longchamp v. Kenny, 5 Moore, 104.

(2) Stiles v. Campbell, 11 Mass. 321.

(3) Squier v. Hunt, 3 Price, 68.

* The following miscellaneous cases may be cited, in which *money had and received* will lie after a sale of goods. A buys goods of B, the agent of C, but not having authority to sell. B applies the proceeds to C's benefit, but C afterwards disaffirms the sale and recovers the goods. A may maintain an action against C for the money paid B. Peters v. Ballistier, 3 Pick. 495. Where a vendee gives his negotiable note for the price, and either the goods are overcharged or the note given for too large a sum; he may recover the excess before paying the note, or even though he paid it after discovering the error. Whitcomb v. Williams, 4 Pick. 228. Where an agent, not authorized to sell on credit, takes a note payable to himself, or unreasonably delays collecting such note, the principal may maintain an action for money had, &c. Hemenway v. Hemenway, 5 Pick. 389. See 7. 214.

† In Massachusetts, upon the ground of immemorial usage, (and probably other states,) *indeb. assump.* lies for goods sold and delivered, as *described in a schedule annexed to the writ*. Nor need the writ state even generally, what the schedule contains. 2 Mass. 398. 13. 284. In the same state it is held, that where a suit is brought upon a special contract, still remaining *executory*, the declaration should state the whole contract. But it is otherwise, where the terms of a special agreement have been performed, and nothing remains to be done but the payment of money. Felton

2. In an action on the case against a vendor, for falsely affirming that the property sold belonged to him, whereby the plaintiff was induced to buy it, and afterwards evicted by the rightful owner; the declaration need not allege either a contract, consideration or price. In such case, a recovery by the true owner is conclusive against the present defendant; and, if the declaration alleges, that the vendor testified, in the former suit between the true owner and the vendee, that he did not own the property; this is equivalent to an averment of notice to the vendor of the pendency of the former suit.(1)

3. Where the declaration contains one count upon a special agreement, and another in *indeb. assump.*, if the evidence sustains the latter, the plaintiff will recover, though he unsuccessfully attempt to sustain the former.(2)

4. The law in many cases requires, that the plaintiff, suing upon a contract of sale, should allege the performance of some act or condition on his own part.

5. Agreement, that A should furnish B a certain quantity of goods, for which B was to pay \$200 at a future time. A brings an action for the price, alleging delivery of the kinds of articles agreed for to the amount of \$200, which B had received in full satisfaction of the agreement, but not the particular quantity delivered. Held, this was a sufficient averment of performance of the condition precedent, or of what was equivalent to performance, by way of accord and satisfaction.(3)

6. Action for non-delivery of goods according to agreement, after a demand. The declaration alleged, that the plaintiff was ready and willing to accept and pay for the goods. Held, this allegation need not be specifically proved, the demand being sufficient evidence of it.(4)

(1) Barney v. Dewey, 13 John. 224.

(2) Keyes v. Stone, 5 Mass. 391.

(3) Richards v. Carl, 1 Blac. 313.

(4) Wilks v. Atkinson, 1 Marsh. 412.

v. Dickinson, 10 Mass. 287. In Kentucky, the declaration may be general for goods, &c. sold and delivered, without specifying the particular description. Snodgrass v. Broadwell, 2 Litt. 355. The price of lottery tickets, if the sale be not illegal, may be recovered in a count for *goods, wares and merchandize* sold and delivered. Yohe v. Robertson, 2 Whart. 155.

7. The defendant agreed to deliver to the plaintiff a quantity of malt at a certain price. In a suit for non-delivery, held, the plaintiff need not allege a tender of the price, but only a request to deliver, and that he was ready and willing to receive and pay for the malt according to agreement, but the defendant refused to deliver. More especially is this sufficient after verdict.(1)

8. Declaration, that in consideration the plaintiff had paid the defendant a certain sum, he agreed to deliver the plaintiff, at R sixty quarters of wheat in certain proportions, and for a certain price, to be paid immediately after delivery ; but the defendant, though often requested to deliver it, and though the plaintiff at the said several times when the wheat should have been delivered, was ready at R to receive it, and pay the defendant the sums which he ought to pay, immediately after receipt of it ; yet the defendant had not delivered the wheat. Held good.(2)

9. In an action by A against B, the declaration alleged, that B was possessed of certain land on which hops were growing, and agreed to sell to A all the hops then growing, at £10 per hundred weight, to be paid by A to B ; the hops to be delivered in packets by B to A at W in R ; that in consideration of A's undertaking to accept and pay for the hops, B promised to deliver them at said place and in said manner, in a reasonable time after they were picked and gathered ; that hops had been picked and gathered, amounting to two hundred weight, and though a reasonable time for delivery had elapsed, and though during and since that time A was ready and willing to accept and pay for them at the rates and in the manner, &c. ; yet B had not delivered them. But the declaration alleged no request or notice to deliver at any particular time, and no tender of the price. Held, as the first act was to be done by the defendant, no such allegation was necessary, and the declaration was good.(3)

10. Action for non-delivery of a quantity of corn, which the defendant, in consideration of the plaintiff's purchasing it of him at a fixed price : undertook to deliver at S within one

(1) Rawson v. Johnson, 1 E. 203.

(2) Norwood v. Norwood, Plowd. 180.

(3) Bristow v. Waddington, 2 N. R. 355.

month from the time of sale. Held, the declaration must allege a tender of the price or some act equivalent thereto. The delivery and payment were to be concurrent acts. It was remarked by the court, that the case did not depend on technical niceties of pleading, but on the true construction of the agreement.(1)

11. Declaration, in consideration that the plaintiff had sold *a certain horse* to the defendant, at and for *a certain quantity of certain oil*, to be delivered within *a certain time*, which had elapsed before commencement of suit, the defendant promised to deliver said oil accordingly. The value of the horse was not stated, nor the value, quantity or quality of the oil. Held good, after verdict. Ld. Eldon was at first of a contrary opinion, but at length concurred with the other judges.(2)

12. Declaration in case, that whereas the plaintiff had agreed to buy, and the defendant to sell and deliver, at a certain rate or price per pound, to be paid in the manner then stipulated, forty bags of wool, to be delivered by the defendant to the plaintiff at a time which, before the making of the defendant's promise, after-mentioned, had elapsed, but which wool had not then been delivered; and thereupon, in consideration of the premises, and that the plaintiff would still receive and pay for the wool at the rate or price, and in the manner, last aforesaid, upon delivery within reasonable time, the defendant promised the plaintiff to deliver the wool within a reasonable time. And though the plaintiff, for a reasonable time after the defendant's promise, was ready and willing to receive and pay for the wool at the rate or price and in the manner last aforesaid, the defendant would not deliver it, &c. Held this declaration was too general, and bad on special demurrer; as it mentioned no price and manner of payment in the first bargain, which nevertheless were referred to, incorporated with, and made part of the consideration of the new promise, upon which this action was founded. Hence nothing was presented to the jury, which could serve as the measure of damages for non-delivery.(3)

(1) Morton v. Lamb, 7 T. R. 125.

(2) Ward v. Harris, 2 B. & P. 265.

(3) Andrews v. Whitehead, 13 E. 102.

SECTION VI.—VARIANCE BETWEEN AVERMENTS AND PROOFS.

1. Nice questions often occur, whether the declaration upon a contract of sale is supported by the evidence, or whether there is a *variance* between the allegations and the proofs.

2. In an action for goods sold and delivered, the declaration alleged that the goods were the property of the plaintiff; but the evidence proved that they belonged to him and another. Held a variance.(1)

3. The plaintiff, in his declaration, alleged a promise by the defendant, made in consideration that the plaintiff would deliver certain goods to a third person. The evidence proved that the plaintiff was to deliver them to the defendant himself. Held a variance.(2)

4. Declaration, that the defendant agreed to deliver goods for the plaintiff. A special agreement was proved, to deliver them to the bearer of a receipt given for them at delivery. Held, the evidence disproved the declaration.(3)

5. In assumpsit, the declaration set forth a written agreement between the plaintiff and defendant, by which the latter was to sell and deliver to the former all the wool that he (the defendant), should cut, annually, for five years, from his sheep, and also what should be cut from those of his two sons. The plaintiff offered in evidence a written contract, signed by the plaintiff, the defendant and his sons; by which the defendant contracted as above alleged, and the sons agreed to improve their flocks in a certain manner, to retain the increase, and that the plaintiff should have the fleeces of such increase. The plaintiff to pay the defendant so much per pound. Held, there was no variance, because the agreement was the sole contract of the defendant; or, if the sons were parties, the promise declared on was that of the defendant alone.(4)*

(1) Ditchburn v. Spracklin, 5 Esp. 31.

(2) Leery v. Goodson, 4 T. R. 637.

(3) Samuel v. Darch, 2 Stark. 60.

(4) Stearns v. Foote, 20 Pick. 432.

* It being proved, that one of the sons owned in common with one A, who howev-

6. Contract to deliver *rough gum senegal*. Declaration, as on a contract to deliver *gum senegal*, generally. Proof, that all gum senegal, on arriving in England, is rough. Held, the declaration was sustained.(1)

7. Agreement, to take in a certain specified quantity of goods. The declaration alleged an agreement to take in a full cargo. Held, a variance, though the quantity named was a full cargo.(2)

8. Agreement, to purchase a parcel of hemp, *about eight tons*. Declaration, an agreement to purchase a parcel of hemp, *to wit, eight tons*; this being the exact quantity in the parcel sold. Held sufficient, though it might have been better to state the facts precisely as they were.(3)

9. Agreement, to purchase all the head matter and sperm oil, per the Wildman. Declaration, that the plaintiff bargained and sold, and the defendant agreed to buy, a large quantity of head matter and sperm oil at a certain price per ton, which was afterwards ascertained to be a given quantity. Held to be no variance. The plaintiff had proved all his declaration, *and something more*. There was no proof of any qualification or condition to the bargain. Objection could be taken, if at all, only by demurrer or in arrest of judgment.(4)

10. The plaintiff declared, that in consideration that he had sold to the defendant 276 hides of leather, and agreed to deliver them, the defendant agreed to accept and pay for them, the weight to be determined by inspection. It was proved, that the defendant agreed to buy a lot of leather then in the vats, and to take what should be stamped *good* by the inspector. Held, a fatal variance.(5)

11. Sale of manufactured goods, with a warranty that they were equal to any manufactured in America. Declaration, as

(1) *Silver v. Heseltine*, 1 Chit. 39.

(2) *Harrison v. Wilson*, 2 Esp. 708.

(3) *Gladstone v. Neale*, 13 E. 410.

(4) *Wildman v. Glossop*, 1 B. & A. 9.

(5) *Hart v. Tyler*, 15 Pick. 171.

er let his share to such son, so that the whole of the wool sheared was sheared by and belonged to the son; held, the defendant's contract included the whole of the wool. An agreement that a third person shall convey certain property is binding, although the party may be unable to fulfil it. *Ib.*

upon a warranty that they were good and merchantable. Held a variance.(1)

12. Sale of *spruce* timber. Declaration, as upon a sale of *pine* timber. Held a variance.(2)

13. Agreement for three hundred and eight chests and thirty half chests of China oranges, and twenty chests of lemons—no price being specified. The plaintiff alleged in his declaration, that he had agreed to sell, and the defendant to buy, certain goods and merchandize, to wit, three hundred and twenty-eight chests and thirty half chests of oranges and lemons, at and for a certain price, to wit, £623, 3s. Held, no variance.(3)

14. A agreed to furnish B with saddles at “24s. 26s.” B brings an action upon this agreement, declaring upon it as a contract to furnish saddles at a *reasonable price*. Held, this was no variance. The legal construction of the agreement was to sell at a price *near about* the sums named.(4)

15. The declaration alleged, that the goods were to be paid for by a bill at two months; but the evidence was, that they were to be paid for by a bill at two months, on receiving the invoice or delivery of the property. Held, this was not a fatal variance. In this case, a special assumpsit was held the proper form of action.(5)

16. A declaration, alleging that the plaintiff was ready and willing to perform his part of the agreement between him and the defendant, is sustained by proving a demand made by his servant in his absence.(6)

17. A contract *in the alternative* must be so stated in the declaration; otherwise, the case shows a variance; although facts occurring subsequently to the contract have rendered it absolute.

18. Agreement to purchase one hundred bags of wheat; *forty or fifty* of them to be delivered on one market-day, the remainder on the market-day next following. Forty bags were

(1) *Goulding v. Skinner*, 1 Pick. 162.

(2) *Robbins v. Otis*, 1 Pick. 368.

(3) *Crispin v. Williamson*, 1 Moore, 547.

(4) *Laing v. Fidgeon*, 6 Taun. 108.

(5) *Squier v. Hunt*, 3 Price, 68.

(6) 1b.

delivered on the first market-day. In an action for non-delivery of the rest, held, the declaration must allege the agreement, as above-stated, in the alternative—*forty or fifty*—not *forty* alone.(1)

19. Contract, to deliver certain goods, *within fourteen days, or on arrival of a certain ship*. The ship arrived after the time mentioned. In an action for non-delivery, one count in the declaration alleged a promise to deliver within fourteen days, and another on the arrival of the ship; but there was no allegation in the alternative. Held insufficient.(2)

20. A contract for the sale of tallow warranted it to be ready for delivery, before a certain day, from the ship or warehouse. The declaration alleged, that it was to be ready for delivery, generally, before the day mentioned. Held, there was no variance. The option as to the place of delivery was given to the vendor, not to the vendee. If a contract enumerate all possible places of delivery, and at the same time give the vendor his option among them, the legal construction is the same, as if such option were given generally. The contract in this case was, to deliver from one or the other of the only places where the goods could possibly be.(3)

21. Agreement, to deliver *soil*. The declaration alleged an agreement to deliver *soil or breeze*. Held, a fatal variance, as *soil and breeze* are distinct articles.(4)

22. Agreement by the defendant to deliver the plaintiff all his tallow at four shillings per stone, and so much more as the plaintiff had to pay to any other person. The declaration alleged that the defendant promised to deliver it absolutely, at four shillings per stone. Held, this was a fatal variance. The contract was not an alternative one, in which the party has his option to do one thing or another; but it was a contract to pay a larger or smaller sum, according to the happening or not happening of a future, contingent event.(5)

(1) Penny v. Porter, 2 E. 2. (See Lent v. Padelford, 10 Mass. 230.)

(2) Shipham v. Saunders, 2 E. 4 n.

(3) Thornton v. Jones, 6 Taun. 581.

(4) Clark v. Manstone, 5 Esp. 239. 1 Chit. 60 a.

(5) Churchill v. Wilkins, 1 T. R. 447.

SECTION VII.—DEFENCES.

1. It is a general rule, that in an action for the price of a chattel, the vendee may prove in defence deceit on the part of the plaintiff, and that the article is of no value; or he may show a partial unsoundness in mitigation of damages. As where the plaintiff sold a mare to the defendant, and represented her to be sound, and she proved to be sick.(1)*

2. So where a vendee gives his note for the price of the thing sold, upon which the vendor brings an action, the former may prove deceit in the sale as a defence. Fraudulent representation renders the note void. As where a shearing-machine was sold and represented to be of great value, but proved to be entirely useless.(2)

3. Plaintiff sold to the defendant a quantity of Leghorn hats, of certain specified qualities and for a certain price, and agreed to deliver extra crowns to match the hats which were delivered, free of charge. The crowns which were sent did not thus match, of which the vendee gave immediate notice, and in consequence of which he suffered a loss. In a suit for the price, held, this was not a case of rescinding the contract, but the

(1) Beecker v. Vrooman, 13 John. 302.

(2) Sill v. Rood, 15 John. 230.

* It was formerly held, in Massachusetts, that a vendee of manufactured goods, who has accepted them without objection, cannot defend against a suit for the price on the ground of bad workmanship. (Everett v. Gray, 1 Mass. 101.) This decision, however, has been questioned in a later case, and seems to be inconsistent with the general current of authorities. See Fisher v. Sumada, 1 Camp. 190. Lewis v. Cosgrave, 2 Tann. 2. Jones v. Scriven, 8 John. 453. Grant v. Button, 14. 377. Beecker v. Vrooman, 13 John. 302. Payne v. Cutler, 13 Wend. 605. Miller v. Smith, 1 Mass. 437. In Kentucky, if the thing is received and used, and of any value, the bad quality is no defence. Allison v. Noble, 1 Litt. 279. In New York, if a note were given, even *fraud* is no defence, unless the vendee, on discovering it, returns the thing, or it is of no value. 3 Wend. 236. If the vendee gave notice to the vendor, he may offer proof to reduce the damages, whether there were warranty or fraud. 13 Wend. 605. 10. 512 4. 483. 8. 109.

vendee might reduce the damages, by showing these facts, in proportion as the articles were of less value to him than they would otherwise have been.(1)

4. An omission to return articles sold does not preclude a dispute as to the price, except in case of conditional sales, where the property is taken on trial, with the liberty of returning it, if the party is dissatisfied, within a limited time.(2)

5. Where a vendee gives a bond for the consideration of the sale, upon which the vendor brings an action, the defendant cannot plead in discharge a false representation or warranty. As where a slave was represented to be honest, sober, &c. A specialty can be invalidated only for *illegality* of consideration, which avoids *ab initio*. Even a breach of written warranty would be no discharge; and still less parol representations, although false and fraudulent and constituting the inducement to purchase. Whether the vendee, in order to avail himself of these facts, must resort to a Court of Equity, or may sue at law, qu.(3)

6. A vendee gave his note for the price of the goods, secured by a pledge of them. Upon non-payment of the note, the vendor re-sold the goods at a loss, and then brought an action for the balance due upon the note. Held, it was no defence to this action, that the loss in the sale was caused by the plaintiff's misconduct, but for this the vendee must resort to an action on the case. The pledgee stood as a *factor* of the defendant, and was bound to exercise skill, diligence and fairness, and accountable for the want of those qualities. But the judgment in this action would be no bar to another suit.(4)

7. In England, in an action for goods sold and delivered, if the defendant plead the general issue, under the new rules of pleading he may prove that the goods vary from the contract, though there was a special agreement to pay a certain price. In such case, the plaintiff will recover only a *quantum valebant*. If the declaration had set out a special contract, under the general

(1) King v. Paddock, 18 John. 141.

(2) King v. Paddock, 18 John. 143, 4.

(3) Vrooman v. Phelps, 2 John. C. 177.

(4) Jones v. Kennedy, 11 Pick. 125

issue the defendant could only have denied the contract *in fact*. But he may deny a part of the *implied* contract alleged in the declaration; viz. that the same goods which had been contracted for were actually delivered.(1) (See *Warranty*.)

8. In an action for goods sold and delivered, the defendant may prove, in defence, that they were delivered in payment for his services, rendered the plaintiff. He need not file an account in off-set.(2)

9. Assumpsit for the price of a pew sold at auction. Held, the plaintiff should recover, without proving a title to the pew.(3) So the defendant, in this action, cannot set up as a defence, that the goods sold belonged to a stranger.(4)

SECTION VIII.—AMOUNT OF DAMAGES.

1. In an action for goods sold and delivered, it was proved that the defendant said he owed the debt, that the plaintiff had demanded payment, and he should pay it as soon as he was able; but mentioned no sum. Held, the plaintiff was entitled to a verdict for nominal damages.(5)

2. In an action by a vendee against the vendor for non-delivery of the thing sold; the measure of damages is not the agreed price, but the value at the time of breach, not afterwards. And this is the measure, although the vendor withhold the property with a view to his own profit. But if there is no fixed price, but the price ranges between different rates; the jury may adopt the highest, lowest or an intermediate rate, according to the conduct of the defendant.(6)*

(1) *Cousins v. Paddon*, 2 Crompt. Mees. & R. 547. (But see *Roffey v. Smith*, 6 C. & P. 662.

(2) *Wilbey v. Harris*, 13 Mass. 496.

(3) *Stoddert v. Vestry*, 2 Gill. & J. 227.

(4) *Wright v. Sharp*, 1 Browne, 344.

(5) *Dixon v. Deveridge*, 2 C. & P. 109.

(6) *Hopkins v. Lee*, 6 Wheat. 109. *Shepherd v. Hampton*, 3 Wheat. 200. *Blydenburgh v. Welsh*, 1 Bald. 331.

* In case of sale without specifying the price, the seller can recover only the value

3. Where there is an agreement to deliver goods at a certain time and place, and a breach thereof; the measure of damages is the difference between the price agreed on, and the market value at the specified time and place. If clear evidence of such value is offered, evidence is not admissible of the value at other neighboring places. But in the absence of the former evidence, the latter is admissible, as raising a presumption in relation to the point at issue.(1)

4. In the month of September, the defendant agreed to deliver tallow to the plaintiff in all the ensuing December, at so much per hundred weight. In October, the defendant told the plaintiff he had sold the tallow, and could not perform his agreement; but the plaintiff did not consent to rescind the bargain. After the making of the agreement, tallow rose in price. Held, the plaintiff should recover as damages the difference between the agreed and the market rate on December 31, the last day on which the contract would authorize the defendant to deliver the tallow. Had the article fallen in price, the plaintiff would still have been bound to take it at the agreed rate. He was not bound to purchase other tallow at a lower price, though he might have done it. The defendant might have purchased for a lower price, as well as the plaintiff.(2)

5. Where goods are sold and delivered upon a credit, and the vendee has violated the contract only in one particular, the damages will be commensurate only with the actual breach. But where the contract is wholly rejected, the damages are not the price of the thing sold, but a compensation for the disaffirmance; and the difference of price upon re-sale is merely the measure of damages actually sustained.(3)

(1) Gregory v. M'Dowell, 8 Wend. 435. Gainsford v. Carroll, 2 B. & C. 624.

(2) Leigh v. Patterson, 2 Moore, 588.

(3) Girard v. Taggart, 5 S. & R. 34. Per Gibson, Ch. J.

at the time of sale; though the value may have subsequently increased. Hill v. Hill, Coxe, 261. So it has been held, that in an action for breach of contract to make payment in tobacco, the plaintiff shall recover the value of the tobacco on the day appointed for payment. Lyle v. Lyle, 6 Har. & J. 273.

CHAPTER XIII.

SALE OR ASSIGNMENT OF CHOSSES IN ACTION.

SECTION I.—WHAT MAY BE ASSIGNED.

1. *General principles. What assignable.*
4. *Policy of insurance.*
5. *Shares in corporations.*
9. *Judgment and execution.*
16. *Miscellaneous cases.*

SECTION II.—FORM OF ASSIGNMENT; WHETHER IN WRITING, BY DELIVERY, &c.

SECTION III.—EFFECT OF AN ASSIGNMENT UPON THE RIGHTS OF THE PARTIES—NOTICE, OFF-SET, &c.

1. *Notice to the debtor, form and effect of.*
9. *Debtor's right of set-off.*

SECTION IV.—REMEDIES IN CASE OF ASSIGNMENT—SUITS AT LAW AND IN EQUITY—DEFENCES, &c.

SECTION I.—WHAT MAY BE ASSIGNED.

1. The law relating to sales of personal property contemplates

for the most part personal property *in possession*; that is, the property commonly known as *chattels*, which have an absolute, and present, and not a mere representative or future value. The other division of personal property consists of *choses in action*, which are mere securities, promises or debts. The most common and important kind of securities, that is, *negotiable paper*, or *bills and notes*, and, in some of the United States, *bonds*, is the subject of a distinct branch of commercial law, and does not fall within the plan of the present work. But it seems not inappropriate, to consider briefly the sale or *assignment*, as it is usually termed, of *choses in action* not negotiable.*

2. The subject of the assignment of choses in action has been often under the consideration of the Courts in England, as well as the United States; and it seems clear at this day, that the assignee is to be considered, in law as well as equity, the party beneficially interested; subject indeed to any legal claim of the debtor, but free from any claim of the assignor, his executors or administrators.(1)

3. All choses in action may be assigned in equity, and the assignee thereby acquires an equitable title, which may be enforced at law in the name of the assignor, and which cannot be

(1) *Cutts v. Perkins*, 12 Mass. 211.

* At common law, *choses in action* are not assignable. 2 John. 1. 15 Mass. 388. See 1 Cranch, 367—466. Appx. A note or bond, payable wholly or partly in personal services, is not assignable. 3 Mis. 82. 4 Litt. 9. 1 J. J. Marsh. 454. 2 Pen. 965. Nor a license to cut timber on land. *Emerson v. Fisk*, 6 Greenl. 200. *Pease v. Gibson*, Ib. 83. A written acknowledgment by A that he had bought goods of B, which he was to settle with B's creditors, is not negotiable. Nor a written acknowledgment of a settlement and balance due. Nor a covenant to deliver boards or do any collateral act, though made payable to order. *Heady v. Vanness*, 2 Pen. 722. *Lacey v. Collins*, 2 South. 489. *Bell v. Curtis*, 1 Pen. 142. *Breen v. Ingram*, 1 Bay, 173. Nor a guardianship bond, under the S. C. statute of 1798. *Cobb v. Williams*, 1 Hill, 375. A right of action for a *tort* is not assignable. Thus a claim to personal property, adversely held by another, cannot be sold, so as to give the purchaser a right of action in his own name. It is said, that, generally, mere personal torts, which die with the party, are not assignable. Otherwise with vested rights *ad rem* and *in re*, possibilities coupled with an interest, and claims growing out of and adhering to property. *Gardner v. Adams*, 12 Wend. 297. See 3 Litt. 41. *Stoddell v. Fugate*, 2 Marsh. 136. *Comegys v. Vasse*, 1 Pet. 193. Shares of seamen in prizes, captured by private armed vessels, are not assignable, so as to admit a suit against the agent in the assignee's name. *Usher v. De Wolfe*, 13 Mass. 290.

affected by his release or bankruptcy. A debt due for goods sold and delivered, and proveable by book account, may be assigned.* So an unliquidated balance of accounts; and if the debtor promise payment to the assignee, he may sue in his own name for the amount due, when ascertained. So a contingent debt is assignable.(1)

4. It has been held, that the assignment of a *policy of insurance* gives the assignee an equitable interest, though the underwriter be not notified. But in another case it is said, that the assignee cannot avail himself of the policy, unless the assignment were made *bona fide*, for valuable consideration, and with notice to, and the express or implied assent of the underwriter. In case of such assent, either express or implied, or founded on usage, the assignee may claim under the policy from the commencement of the voyage; the assignor is discharged from the premium, and the assignee bound to pay it. But every set-off between insurer and insured, prior to the assignment, is good against the assignees.(2)

5. *Shares in corporations* constitute an important class of choses in action, which in commercial intercourse are often assigned, and the forms and occasions of assigning which are generally regulated by express statute. Some cases have arisen, upon the question how far such regulations must be literally complied with, in order to pass a title to the assignee. The further question is sometimes involved, whether such shares can be assigned so as to defeat a lien of the corporation for its dues.

6. An act of incorporation provided, that no transfer of

(1) *Dix v. Cobb*, 4 Mass. 508. *Gould v. Newman*, 8. 239. *Parker v. Grout*, 11. 157. *Graves v. Brown*, 11. 334. *Wood v. Partridge*, 11. 488. *Usher v. De Wolfe*, 13. 290. *Crocker v. Whitney*, 10. 316. *Mowry v. Todd*, 12. 481. *Allen v. Holden*, 9. 133. *Brown v. Maine Bank*, 11. 153. *Dunn v. Snell*, 15. 481. *Norris v. Douglass*, 2 South. 817. *Black v. Everett*, 5 Stew. & P. 60. *Garland v. Raheson*, 4 Rand. 266. *Lyon v. Summers*, 7 Conn. 399. *Wadsworth v. Griswold*, Harper, 17. Sloan v. Sommers, 2 Green. 510. *Woodbridge v. Perkins*, 3 Day, 364.

(2) *Wakefield v. Martin*, 3 Mass. 558. *Carroll v. Boston M. I. Co.*, 8. 515. *Cleveland v. Clap*, 5. 201. *Gourdon v. Ins. Co., &c.*, 3 Yeates, 327. 1 Binn. 429. *Spring v. South Carolina, &c.*, 8 Wheat. 268.

* In South Carolina, the assignment of an open account merely gives an authority to receive the money and settle the account. Hence, even after notice, a receipt from the assignor will be a good discharge. *Brown v. Rees*, 2 Const. 498. 1 Brock 456.

shares should be valid, till the whole capital stock were paid in. Held, a corporator might still transfer to his creditor, by way of security, his equitable interest in the corporation, before having paid his whole subscription; and that the assignee was entitled to a certificate on paying the balance due.(1)

7. The charter of a bank provided, that the stock should be retained by the subscribers for one year from the date of such charter, and a by-law made all shares liable, as security for debts due from the persons owning them to the bank. Within the year, A, a stockholder, assigned his shares to B, who notified the bank, and paid the last instalment due upon them. The bank, having afterwards made a loan to A, claimed to hold the shares as security therefor. Held, it could not thus hold them against B, the transfer to him, though not entitling him to a certificate in his own name, being an equitable assignment, which bound the bank after notice.(2)

8. The by-laws of an insurance company provided, that the certificates of stock should be transferred only at the office of the company, by the holder or his attorney; that transfers should be authenticated by the president, and attested by the secretary, and that it should be the duty of the former to attend at the office during business hours. An assignment of certain shares was made to A and B, partners, with a power to them to transfer the shares upon the books. A called at the office during business hours, and, in the absence of the president, exhibited to the secretary the assignment and power, and demanded that the shares should be transferred on the books, and certificates issued to himself and B; but the secretary refused, saying it was the business of the president. Held, the company were bound to make the transfers and issue certificates, though they held notes of the assignors for premiums, one of which was then due.(3)

9. The equitable interest in a *judgment* may be assigned, by

(1) *Quinerv. Marblehead, &c.*, 10 Mass. 476. *Alvord v. Smith*, 5 Pick. 232.

(2) *Nesmith v. Washington, &c.*, 6 Pick. 324.

(3) *Sargent v. Franklin, &c.*, 8 Pick. 90.

delivery of the execution. And where a judgment and execution are *bona fide* assigned for valuable consideration; the assignee may cause the execution to be levied upon lands of the debtor; and, if the assignor afterwards release his right to the assignee, the latter will have a good title against creditors of the assignor, having notice of the assignment, though they attach the property before such release. But the assignment of an execution does not enable the assignee to sue, in his own name the officer who fails to collect and pay over the money. Nor does the assignment of a judgment transfer the assignor's right to recover against the sheriff for previous neglect of duty, respecting executions issued on such judgment. Nor does the assignment extinguish such right.(1) (See *infra*, 12.)

10. The assignor of a judgment cannot discharge it, either by receiving the money, or agreeing to off-set a claim held by the debtor against himself.(2)

11. If the assignor of a judgment enters up satisfaction on the record, after notice to the debtor; the Court, on motion, will vacate such entry.(3)

12. An assignee, having recovered a judgment in the assignor's name, handed an execution to the sheriff, notifying him at the same time of the assignment. The sheriff suffered the debtor to escape, after arrest. Held, he was liable to an action by the assignee in the assignor's name, and that the latter could not defeat such action by a release.(4) (See *supra*, 9.)

13. The assignment of a judgment carries the damages afterwards given upon the dissolution of an injunction, and upon appeal, &c.(5)

14. The assignee of a judgment, recovered in another state

(1) *Dunn v. Snell*, 15 Mass. 481. *Brown v. Maine Bank*, 11 Mass. 153. *Pearson v. Talbot*, 4 Litt. 435. *Patterson v. Wilkinson*, Wright, 501. *Governor v. Griffin*, 2 Dev. 352. *Jones v. Com.*, 2 Litt. 357. *Com. v. Fuqua*, 3 Litt. 41

(2) *Sampson v. Fletcher*, 1 Verm. 168.

(3) *Wardell v. Eden*, 2 John. Cas. 121. 258. 1 John. 531.

(4) *Martin v. Hawks*, 15 John. 405.

(5) *Marshall v. Craig*, 3 Bibb. 291.

against a citizen of Kentucky, may use the name of the assignor to enforce payment; but if the assignor be dead, and there be no administrator in Kentucky, the assignee may apply to Chancery in his own name, and will not be compelled to administer.(1)

15. A decree in Chancery is not assignable at law, but may be assigned, for valuable consideration, in Equity.(2)

16. The bid of a purchaser at sheriff's sale is assignable, and the assignee, by a bill of sale from the officer, gains a valid title.(3)

17. A bond with penalty, conditioned to convey land to the obligee or his appointee, is assignable after forfeiture.(4)

18. The trustees of an academy may assign to a college, which is authorized to receive funds in their hands, notes included in such funds.(5)

19. In Kentucky, by Statute, a covenant to pay a certain sum in promissory notes is assignable.(6)

20. The assignment of a bill of sale of chattels passes a title, so that the assignee may bring *trover* against a subsequent purchaser.(7)

21. A town, liable for the support of a pauper, and making provision therefor, may validly assign his services to one who will contract to furnish such support. But a servant bound by indenture is not a proper subject of assignment, the trust of the master being strictly personal.(8)

22. A contract was made between a town and one A, by which the latter was to support certain relatives while they lived, and the town to give him the use and occupation of a farm

(1) Cobb v. Thompson, 1 Marsh. 508.

(2) Coates v. Muse, 1 Brock. 552.

(3) Blount v. Davis, 2 Dev. 19.

(4) Ensign v. Kellogg, 4 Pick. 1.

(5) Amherst, &c. v. Cowls, 6 Pick. 427.

(6) Sirlott v. Tandy, 3 Damon, 142.

(7) Southworth v. Sebring, 2 Hill, 587.

(8) Wilson v. Church, 1 Pick. 23. Hall v. Gardner, 1 Mass. 172. Davis v. Cornburn, 8. 299.

during the lives of his parents, and afterwards give him a deed of it. Held, not an assignable contract.(1)

SECTION II.—FORM OF ASSIGNMENT, WHETHER IN WRITING, BY DELIVERY, &c.

1. It was once held, that the assignment of an instrument must be of as high a nature as the instrument itself.* So, it seems, that any instrument, not negotiable, could be assigned only by deed. It was afterwards said to be doubtful, whether a manual delivery would be sufficient. But later cases have decided, that such delivery is a sufficient assignment of a note, bill, judgment, execution, or other chose in action.(2)

2. Thus, in New York, an obligation or covenant may be assigned by an unsealed instrument.(3)

3. So a judgment may be assigned by parol, or by an unsealed writing.(4)

4. If an assignment be written upon the back of an instrument, but not signed, and the instrument delivered to the assignee for valuable consideration; this is a valid transfer.(5)

5. But a verbal agreement, which contemplates a further assignment, will not be held to be itself an assignment, more especially where the rights of creditors have intervened by the bankruptcy of both parties.

6. A, being assignee of a bankrupt, had a demand for collec-

(1) *Clinton v. Fly*, 1 Fairf. 292.

(2) *Perkins v. Parker*, 1 Mass. 117. *Wood v. Partridge*, 11. 488. *Cutts v. Perkins*, 12. 206. *Willis v. Twamby*, 13. 204. *Jones v. Witter*, 13. 304. *Dunn v. Snell*, 15. 481. *Quiner v. Marblehead, &c.*, 10 Mass. 476. *Titcomb v. Thomas*, 5 Greenl. 282. *Clark v. Rogers*, 2. 147. *Briggs v. Dorr*, 19 John. 95, 17. 284. 3 Greenl. 349, 2. 322. 1 Har. & J. 114.

(3) *Dawson v. Coles*, 16 Johns. 51. *Howell v. Bulkley*, 1 N. & M. 250.

(4) *Ford v. Stuart*, 19 Johns. 342.

(5) *Mowry v. Todd*, 12 Mass. 281.

* It has been held in North Carolina, that a written contract can be assigned only by a writing upon the paper which contains it. *Estes v. Hairston*, 1 Dev. 354.

tion against B, a creditor of the bankrupt, who had proved his claim. A being ordered to attach B's property, an attachment was issued and delivered to an officer, who was about to serve it, when it was agreed between A and B that A should retain the monies which should come to his hands, as assignee, on account of this claim; and that B should assign, for benefit of creditors, his claims on the bankrupt's estate. The attachment was not served. B afterwards became bankrupt, and his assignees sued to recover from A the money received by him as assignee. Held, notwithstanding the above agreement, the action would lie, the parties having never made the proposed assignment, nor signed any writing at the time, and it being against public policy, to give effect to loose bargains in cases of bankruptcy.(1)

7. A letter of attorney, irrevocable, to receive money to the attorney's own use, is *prima facie* an assignment; but may be controlled by extrinsic evidence.(2)

8. Agreement by A to assign to B part of a judgment, recovered by C against D. Held, no execution of such agreement, to send B a copy of the judgment, with an assignment by C to A.(3)

9. Where a bill of exchange is assigned by delivery to several persons, one of them may assign his share of it to the rest, by delivery to them, and payment to him of the consideration.(4)

10. An oral agreement between a plaintiff and a third person, that the latter shall receive the money sued for, is not an assignment.(5)

11. The secretary of a corporation received an order for money, payable to himself personally, the money, when paid, to be applied in payment of a debt due the corporation from the drawer. The secretary afterwards passed it over to the treasurer for that purpose, with notice to the acceptor. Held, a good assignment, and that the secretary could not discharge the acceptor.(6)

(1) Foster v. Lowell, 4 Mass. 308.

(2) Gerrish v. Sweetser, 4 Pick. 374.

(3) Harris v. Earle, 4 Har. & J. 274.

(4) Titcomb v. Thomas, 5 Greenl. 282.

(5) Seaver v. Bradley, 6 Greenl. 60.

(6) Twett v. Green, 4 Greenl. 384.

12. A acknowledged in writing, that he had settled his account with B, and found a certain balance due B. B, at the bottom of this instrument, wrote as follows—"the above acknowledgment of A is to be understood due to C, being for transactions by me on his account. B." It seems, this is an assignment to C, which authorizes him to bring an action of debt, describing both writings in the declaration, and not stating the one signed by B, as an assignment for pecuniary consideration.(1)

13. A bond having been given to the acting partner of a late firm, he afterwards conveyed all his real and personal estate in trust for the payment of his debts and those of the firm; not mentioning those due to the firm. Held, this assignment did not include the bond above named.(2)

14. A, holding a bond of B, put it into C's hands, to collect when due, and, if not paid, to hand it to an attorney for collection, which was done. A then, by letter, stated to C, that he owed D \$200 *out of* the money B owed him, and desired C, when he should collect it, if he (A) were not present, to pay the whole to D. D presented the letter to C, who merely told D, that B's bond was in the hands of an attorney. A owed D less than the amount of the bond. Held, A's letter was neither an equitable assignment to D of any part of B's debt, nor a security for D's debt.(3)

15. A note in the hands of a depositary was assigned by a separate writing, with power to sue. The depositary having refused to deliver it to the vendee; held, the latter might maintain *trover* against him in the name of the vendor.(4)

16. A, holding a note against B, receives from B another note, to be collected, and the proceeds applied in payment of the former one. Held, an equitable assignment, which vested a power coupled with an interest in A, who therefore was not liable in *trover* for refusing to return the assigned note.(5)

(1) *Cunningham v. Herndon*, 2 Call. 447.

(2) *Anderson v. Bullock*, 4 Munf. 442.

(3) *Clayton v. Fawcett*, 2 Leigh. 19.

(4) *Day v. Whitney*, 1 Pick. 503.

(5) *Canfield v. Monger*, 12 John. 346.

17. An order, bill or draft, drawn for the whole of a particular fund, is an equitable assignment thereof, after notice to the drawee. Otherwise, where it is for only part of a fund.* And an order is *prima facie* a good assignment, though not expressed as for value.(1)

18. A ship-master drew a bill of exchange upon the consignee of goods for the money which might become due to him for freight, upon delivery of the goods. Before the payee came in possession of the bill, the drawer died; but it was afterwards accepted and paid by the drawee. Held, the bill, though invalid as such, was a legal assignment of the drawer's claim for freight when it should fall due; and that the administrator of the drawer therefore could not recover this claim from the consignee.(2)

19. A gave to B an order on C, his agent, to pay B a certain sum from such debts of A as should be received by C, which order C accepted. Held, an assignment of the funds to the amount of the order.(3)

20. But where an order is in its terms general, and includes the proceeds of other securities than the one in question, and is accepted subject to certain conditions; it is not an assignment of the note referred to.

21. A, holding the note of B, left it, with other demands, with C, an attorney, for collection. A afterwards drew an order upon C, to pay D what he should receive upon the above demands, which order C accepted as follows—"I will pay such sums as I receive, after getting my due, to the person presenting this order." Held, not to be an assignment of the note, and that C was justified in paying it to A.(4)

(1) *Mandeville v. Welch*, 5 Wheat. 285. *Robbins v. Bacon*, 3 Greenl. 346. *Corsier v. Craig*, 1 Wash. 424. *Adams v. Robinson*, 1 Pick. 462. *Harrington v. Rich*, 6 Verm. 666.

(2) *Cutts v. Perkins*, 12 Mass. 206.

(3) *Peyton v. Hallett*, 1 Caines, 363. 3 John. 72.

(4) *Thayer v. Havener*, 6 Greenl. 212.

* An assignment will be protected, though not absolute, or of the whole subject matter; if it passes a power with an interest. *Wheeler v. Wheeler*, 9 Cow. 34.

SECTION III.—EFFECT OF AN ASSIGNMENT UPON THE RIGHTS
OF THE PARTIES—NOTICE, OFF-SET, &C.

1. It has been already intimated, and is indeed a necessary inference from the respective rights of giving and taking an assignment of *choses in action*; that, after the assignment, the liability of the debtor being transferred from assignor to assignee, payment is to be made to the latter instead of the former. This, however, is subject to the equitable qualification, that the debtor has *received notice* of the assignment. What kind or degree of notice is necessary, to impose the new obligation upon him, has been a point of somewhat conflicting decisions.

2. In New York, it is said, something equivalent to direct and positive notice of the assignment is necessary, to charge the debtor with a fraudulent payment to the assignor. But in the same state, as well as others, it seems to be held, that an assignment will bind any party who has such knowledge of facts and circumstances as ought to put him on inquiry. Special notice is unnecessary, nor need the assignee exhibit to the debtor the instrument itself, or any other evidence.(1)

3. Thus the holder of a due-bill assigned it by indorsement in blank. The assignee demanded payment, but did not show the due-bill, nor expressly state that it had been assigned; and the debtor promised to settle it the next week in New York. He afterwards paid it in New York to the assignor. Held, the assignee could not maintain an action in the assignor's name.(2)

4. In Connecticut, the assignment of a note or book-debt is not complete till notice to the debtor; but the property remains liable to creditors of the assignor. Otherwise in Massachusetts, Pennsylvania and Kentucky; where the assignment itself passes an equitable title, subject only to the duty of notifying

(1) *Meghan v. Mills*, 9 Johns. 64. *Anderson v. Van Alen*, 12 John. 343. U. S. v. *Sturges*, Paine, 525. *Ib.* 629. *Kellogg v. Krauser*, 14 S. & R. 137. *Davenport v. Woodbridge*, 8 Greenl. 17.

(2) *Ib.*

the debtor, in season to enable him to resist a claim made by a creditor of the assignor.(1)

5. In the same state, an assignment is good between the parties, without notice ; and one having knowledge of it is not a *bona fide* creditor, who can take the property for his debt.(2)

6. In Maine, notice is sufficient, without producing the instrument assigned, or any evidence of the assignment.(3)

7. Where the assignment of a chose in action is lawfully rescinded, notice to the debtor will complete the effect of such rescinding, and restore to the assignor the ownership and control of the debt.

8. An infant assigned a *chose in action* in payment for goods, and afterwards offered to return the goods, and take back the *chose*. The debtor received notice that the contract was thus rescinded. Held, the *chose* thereby ceased to be the property of the assignee, and the infant might validly discharge it.(4)

9. The right of an assignee is subject to the further qualification, that the debtor may offset any claim, in a suit by the assignee, which he might have done, had it been brought by the assignor ; unless he promise, without exception, to make payment to the assignee.(5)

10. The debtor may offset a demand against the assignee, though the suit is in the assignor's name.(6)

11. The debtor cannot offset a demand held by him at the time of assignment, if he had notice from the assignee or his agent that it was about to be made, and did not disclose such demand.(7)

12. Nor where his conduct is such as in equity to deprive him of the right of set-off.(8)

13. A gave B a receipt for lumber to a certain amount, to be

(1) Woodbridge v. Perkins, 3 Day, 364 5. 534. Dix v. Cobb, 4 Mass. 512. Stevens v. Stevens, 1 Ashm. 190. Stockton v. Hall, Hard. 160.

(2) Bishop v. Holcomb, 10 Conn. 444.

(3) Davenport v. Woodbridge, 8 Greenl. 17.

(4) Willis v. Twambly, 13 Mass. 204.

(5) 12 Mass. 193. 195. 281. 14. 291. 1 Paige, 319. 1 Root, 349. 20 John. 144. 5 Mass. 215. 3 Monr. 510. 3 Hayw. 199.

(6) Corser v. Craig, 1 Wash. C. 424.

(7) King v. Fowler, 16 Mass. 397.

(8) Kemp v. M'Pherson, 7 Har. & J. 320.

applied in payment of a debt due from B to A. B assigned the receipt to C, who notified A thereof, and then brought an action against him in B's name for goods sold and delivered. Held, although the receipt was not at first assignable, being appropriated to payment of B's debt, yet, as the parties had changed this application, and A had disabled himself to make it; the action would lie, notwithstanding a settlement between A and B.(1)

14. A, having a claim for goods sold, against B, became surety in a note given to B by C, which, not being negotiable, was afterwards assigned, by delivery, to D. D demanded payment of A, who referred him to C as the principal, but was silent as to his own claim against B. Held, A hereby waived his right to offset such claim against the note in the hands of D.(2)

15. A, having given a bond to B, took an assignment of a bond for the same amount, made by B. A offered to offset his claim against the other, but B refused, on the ground that he had an equitable counter-claim against the assignors. A afterwards re-assigned to C, for valuable consideration and without notice. Held, B by his conduct had not waived his right of discount, but might offset a judgment recovered upon the bond of A against a suit upon his own bond.(3)

16. A gives a bond to B, who assigns it to C, there being at the time of assignment a running account between A and B. After commencement of a suit upon the bond, A and B made a settlement, and B promised at the foot of the account to pay the balance found due in three years. Held, this balance could not be set-off against the bond.(4)

17. An assigned bond is a good discount against another. But if the plaintiff can show by a receipt that the former has been paid, such receipt will not be barred by the statute of limitations, and a set-off will not be allowed.(5)

18. The assignee of a contract is concluded in Equity by a

(1) *Eels v. Finch*, 5 John. 193.

(2) *Merrill v. Merrill*, 3 Greenl. 463.

(3) *Pickel v. Morris*, 2 Wash. 255.

(4) *Scott v. Jones*, 1 Brock. 244.

(5) *Comptv v. Alken*, 2 Bay. 481.

judgment at law against the assignor, if he had notice of the suit.(1)



SECTION IV.—REMEDIES IN CASE OF ASSIGNMENT—SUITS AT LAW AND IN EQUITY, DEFENCES, &c.

1. The assignee of an instrument not negotiable cannot sue upon it in his own name, though expressly made payable to assigns.* But judgment will not be arrested for this cause. If the assignor is insolvent, and a suit is pending in his name for the assignee's benefit, the Court will allow the defendant to suggest on the docket for whose use the suit is brought, and will rule the assignee to respond costs.(2)

2. Where one who holds a contract obtains the money due upon it, he is entitled to retain the money, if he has an equitable right to it, though there has been no assignment in writing. But unless the debtor agrees to pay him, an action must be brought in the name of the assignor.(3)

3. If the assignor of a chose in action die, the assignee may sue in the name of his executor, &c. On the other hand, if an executor promise an assignee of a claim against the testator, to pay such claim, in consideration of the assignment and of assets; he is personally liable.(4)

4. The assignee of a chose in action may sue in Chancery in his own name, though the assignment were without consideration. But the assignee of an insolvent debtor cannot sue in the U. S. court, unless his assignor might have done the same. Nor can an assignee bring a suit in *Equity*, merely on the ground

(1) *Curtis v. Cisna*, 1 Ham. 429. 3 Greenl. 362. 1 Paige, 41.

(2) 1 *McCord*, 219. *Gould v. Newman*, 6 Mass. 239. *Porter v. Millet*, 9. 101. *Skinner v. Simes*, 14. 107. *Canby v. Ridgway*, 1 Binn. 496.

(3) *Mowry v. Todd*, 12 Mass. 281.

(4) *Dawes v. Boylston*, 9 Mass. 337. 12. 206. 1 Verm. 57.

* The assignment of a claim passes with it all the remedies for its recovery, though not specially mentioned. *Mehaffy v. Share*, 2 Penns. 361.

that *law* does not allow him to sue in his own name; unless the assignor prevents him from using his name, or would himself have had the right to sue in Equity.(1)

5. In England, the king may sue in his own name upon a chose in action assigned to him. And the same principle would apply to the United States. But they would be barred by the statute of limitations, if the assignor were thus barred.(2)

6. In Mississippi, the assignee of a chose in action may sue in his own name. Hence, where an executor, having proved the will in Kentucky, assigned a note due the estate from a citizen of Mississippi, held, the assignee might sue, without proving the will in that state.(3)

7. Where one of several joint promisees is also promisor, neither the assignee of the other nor of all the promisees can sue at law, but only in equity.(4)

8. An assignment of a chose in action, founded on illegality, though made without notice, does not preclude the defendant from setting up such illegality in defence.(5)

9. Chancery will set aside an assignment void at law, and necessarily leading to fraud and corruption. Thus D assigned all his claim and right of action against A for a quantity of wine, to S, in trust for the creditors of D. P, an attorney, having learned the grounds of the claim from D and S, purchased the right of action from S, who supposed it desperate, for a small sum, and then prosecuted the suit for his own benefit, and obtained a judgment for the whole amount. Held, the agreement and assignment were void for champerty; and on condition that S should refund to P the sum paid, a perpetual injunction was awarded.(6)

10. Payment to the assignor is a good defence, if the assignment was without consideration. Even though the debtor has

(1) *Ensign v. Kellogg*, 4 Pick. 1. *Sere v. Pitot*, 6 Cranch, 335. *Moseley v. Boush*, 4 Rand. 392.

(2) *U. S. v. Buford*, 3 Pet. 13.

(3) *Harper v. Butler*, 2 Pet. 239. See *Walker*, 69.

(4) *Galewood v. Lyle*, 5 Monr. 7. *Ramsey v. Johnson*, Minor, 418. *Justices v. Armstrong*, 3 Dev. 288.

(5) *Fales v. Mayberry*, 2 Galli. 560.

(6) *Arden v. Patterson*, 5 John. Cha 44.

previously been summoned as trustee of the assignor, and discharged upon disclosing the mere fact of an assignment.(1)

11. An assignee cannot hold the assignor liable, on account of an off-set set up against the assigned demand, unless he have given him notice thereof.(2)

12. If the defendant in a suit upon an assigned demand prevail, he cannot bring an action against the assignee, who sued in the assignor's name, for the costs.(3)

13. To a plea of former recovery, the assignee may reply the assignment and notice to the debtor; alleging also that the former action was not prosecuted by authority and for the benefit of the assignee.(4)

14. After assignment, a plaintiff cannot discontinue his action upon the assigned demand. Nor bar a future action, by collusively dismissing the present one.(5)

15. One entitled to a distributive share in an estate, assigned it, but afterwards collected and used the amount due. Held, the assignee could not recover the money from him in a suit at law.(6)

16. Where the debtor, after notice of an assignment, pays the assignor and takes a discharge in writing, and the assignee then brings an action against the assignor and recovers the consideration paid; the assignee may still recover from the promisor the balance due, after deducting the amount of such consideration.(7)

17. The assignment of a chose in action imposes on the debtor an equitable and moral obligation to pay the assignee; which, though constituting an implied assumpsit, is a good consideration for an express promise, that will authorize a suit in the assignee's own name.(8)

(1) *Dunning v. Sayward*, 1 Greenl. 366.

(2) *Drayton v. Thompson*, 1 Bay. 265.

(3) *Bennet v. McFall*, 2 Rep. Con. Ct. 198. 2 Con. R. 769.

(4) *Dawson v. Coles*, 16 John. 51.

(5) *McCullum v. Coxe*, 1 Dall. 139. *Welch v. Mandeville*, 1 Wheat. 236.

(6) *Smith v. Gray*, 1 Dev. & Bat. 42.

(7) *Willis v. Twambly*, 13 Mass. 204. *Dix v. Cobb*, 4. 508. *Jones v. Witter*, 13. 304.

(8) 10 Mass. 316. 12. 281. 13. 290, 304. 14. 107. 15. 387. 7 Har. & J. 213. 3 N. H. 82. 7 Verm. 195. 1 McCord, 219. 4 Cow 13. 2 Fairf. 385.

CHAPTER XIV.

STATUTE OF FRAUDS.

SECTION I.—OBJECTS AND MODE OF CONSTRUCTION OF THE
STATUTE.

SECTION II.—TO WHAT CONTRACTS THE STATUTE IS APPLI-
CABLE.

SECTION III.—REQUISITES OF A WRITING UNDER THE STATUTE.

1. *Consideration.*
2. *Defendant only need sign the writing.*
4. *Names and price must be mentioned.*
5. *Several memorandums may be coupled together.*
14. *What is a signing.*
19. *Contracts made by agents, brokers, &c.*
37. *An admission must be taken all together.*

SECTION I.—OBJECTS AND MODE OF CONSTRUCTION OF THE
STATUTE.

1. *The Statute of Frauds* has been often incidentally referred to in previous chapters of this work. Indeed its provisions so far modify the law of sales of personal property, that an express or tacit reference to them becomes necessary, in treating of almost every title of that law. It remains to consider briefly a few points more directly and exclusively applicable to the act in question.

2. It may be useful to present in a connected form some of the opinions of eminent judges, in relation to the purposes and rules of construction of this very important statute.

3. Mr. Chief Justice Best remarks, that "the Statute of Frauds and the statute of limitations were both so much objected to when they were passed, that the judges appeared anxious to get them off the statute book. But in later times they have become desirous to give them their full effect. I think the Statute of Frauds is a good and wholesome statute. In other countries, contracts are made in writing." (1)

4. Mr. Justice Bayley remarks, that the Statute of Frauds is a remedial law, and that the Court ought not to endeavor to strain words to take a case out of it. (2)

5. The Statute of Frauds was made for wise and beneficial purposes, and ought to be construed according to the plain meaning of the Legislature. It is a highly beneficial and remedial statute. (3)

6. Best, J., says "so far from being disposed to restrain the provisions of this statute, I should be inclined to extend them." "It is better to adhere to the words of the statute, unless we plainly see that the words used do not express the meaning of the Legislature." (4)

7. It is of great consequence to preserve unimpaired the several provisions of the Statute of Frauds, which is one of the wisest laws in our statute book. (5)

8. The Statute of Frauds is a very beneficial act; and its objects are best secured by adhering strictly to its provisions, unless in cases which clearly do not fall within the meaning. (6)

9. The Statute of Frauds, and the rule excluding parol evidence in relation to written contracts, are subjects quite distinct in their nature. (7)

(1) Proctor v. Jones, 2 C. & P. 534.

(2) 5 B. & A. 859.

(3) Per Abbott, Ch. J., 3 B. & A. 323. 683. 2 B. & C. 40.

(4) 3 B. & A. 326.

(5) Per Ld. Kenyon, Chaplin v. Rogers, 1 E. 194.

(6) Phillips v. Hunnewell, 4 Greenl. 379.

(7) Per Ld. Ellenborough, 1 M. & S. 26.

10. The principal design of the Statute of Frauds was, that parties should not have imposed upon them burdensome contracts which they never made, and be fixed with goods which they never contemplated to purchase.(1)

SECTION II.—TO WHAT CONTRACTS THE STATUTE IS APPLICABLE.

1. *Executory* contracts are generally void, unless the Statute of Frauds is complied with. Whether the Statute is applicable to an executed agreement, seems to be somewhat doubtful. But the weight of authority is, that it is not thus applicable.(2)

2. Where a thing is *in esse*, though in an imperfect state and unfit for use, and the parties evidently contemplate what is substantially *a sale*, the Statute of Frauds applies—as in case of flour, which is not prepared, and unground.(3)

3. An agreement to sell oil, not yet expressed from seed in the possession of the vendor, or to supply a house with pipes, to be laid in a certain way, is an agreement for the sale of goods within the Statute of Frauds. So a sale of growing trees, to be taken within a certain time.(4)

4. It is held in New York, that an agreement to sell a boat-load of wheat, to be delivered at a future time, is within the Statute of Frauds, if none is delivered at the time, no earnest paid, or note given. But in Maryland it has been decided, that an agreement to deliver wheat at a future time, which is not yet threshed, is not within the Statute of Frauds. The same case, however, holds, that the Statute of Frauds applies, where work

(1) Per Ld. Ellenborough, 1 M. & S. 26.

(2) Eichelberger v. M'Cauley, 5 Har. & J. 213. Rondeau v. Wyatt, 2 H. Bl. 63. Cooper v. Elston, 7 T. R. 14. Brown v. Bellows, 4 Pick. 189. Bucknam v. Nash, 3 Fairf. 474.

(3) Garbutt v. Watson, 5 B. & Ald. 613.

(4) Wilks v. Atkinson, 6 Taun. 11. West Middlesex, &c. v. Suwerkrop, Moo. & M 408. Putney v. Day, 6 N. H. 430.

is to be done upon the goods before delivery, unless such work is itself a part of the contract.(1)

5. The defendant went to the shop of the plaintiff and selected a lining for a carriage, the plaintiff having on hand, at the time, the body of a carriage nearly completed, but not lined. After a conversation between the parties, it was understood that the plaintiff should finish a carriage for the defendant in a fortnight. The one on hand was accordingly completed, and the defendant notified, and requested to take it. Held, this was not a *contract of sale*, within the Statute of Frauds, but the agreement of a workman to manufacture an article for his employer ; and therefore that it was valid, though not in writing. The carriage intended to be sold did not exist at the time, as the materials, though partly wrought, had not been put together. It would be otherwise with a contract of sale, either of a thing existing at the time, or of articles which the vendor usually has in his business, though to be executed *in futuro*. But in this case, there must be an actual or constructive delivery and acceptance, to justify an action *for the price*. But the plaintiff, having declared originally for a carriage sold and delivered, and for labor and materials, was allowed to amend by adding a count upon an agreement to take and pay for a carriage to be built by his order.(2)

6. It has been a disputed point, whether the Statute of Frauds is applicable to a contract concerning the sale of *shares* or *stock*. In one case, all the judges of England were equally divided upon this question. In Massachusetts it is held, that shares in a corporation are within the provision of the Statute of Frauds, relating to the sale of goods. The term used in the Statute, "goods," from the Latin, *bona*, is almost as extensive in its import as *personal property*. The term *merchandise*, also, includes all subjects of traffic, which shares undoubtedly are.(3)

7. A parol contract for the sale of both real and personal property, if entire and founded on one consideration, being void as

(1) Jackson v. Covert, 5 Wend. 189. Eichelberger v. McCauley, 5 Har. & J. 213.

(2) Mixer v. Howarth, 21 Pick. 305.

(3) Pickering v. Appleby, 1 Com. R. 354. 2 Equ. Cas. Abr. 50. pl. 27. 2 P. Wms. 308. Tisdale v. Harris, 20 Pick. 9.

to the former, is void for the whole. So held, in case of the sale of wood or timber composing a broken down mill, in connexion with the mill-site, &c.(1)

8. Sales at auction are within the Statute of Frauds.(2)

SECTION III.—REQUISITES OF A WRITING UNDER THE STATUTE.

1. Where one agrees in writing to buy goods at a certain price, he will be bound, although no consideration is proved, except what may be inferred from this agreement.(3)

2. It is sufficient, under the Statute, that the party *defendant* signed the contract, whether he be vendor or vendee, though the plaintiff did not; and therefore the former has no remedy against the latter. In relation to the plaintiff, in such case, the Statute merely interposes an obstacle in the way of *evidence*, but does not affect *the substance of the contract*. The defendant is to suffer from his own neglect to obtain the proof necessary to charge the plaintiff.(4)

3. A contract for the sale of goods binds a party who signs the memorandum, though he receives no counterpart from the other, though his signature is above the body of the memorandum, and though it does not specify the weight of the goods. But such a contract, without delivery, does not pass the title to the goods.(5)

4. The memorandum, required by the Statute, must mention the names of both parties or their agents, and the price. A written offer or proposal is insufficient, unless it be also accepted in writing.(6)

(1) Thayer v. Rock, 13 Wend. 53.

(2) Long, (Am. Ed.) 60. Davis v. Rowell, 2 Pick. 64. Chit. on Contr. 317 a.

(3) Egerton v. Mathews, 6 E. 307.

(4) Thornton v. Kempster, 5 Taun. 788. Russell v. Nicoll, 3 Wend. 112.

(5) Penniman v Hartshorn, 13 Mass. 87.

(6) Champion v. Plummer, 1 New R. 252. Elnore v. Kingscote, 5 B. & C. 583

5. To satisfy the statute, the whole terms need not be in one memorandum. It is sufficient, that they may be collected from several writings referring to one agreement, or from subsequent letters which refer to each other, whereby the transaction is admitted.(1)

6. Thus where the purchaser of a quantity of flour, after part-delivery, notified the vendor in writing that the flour was bad and unsaleable, and that he must come and take it away ; which notice stated the quantity, quality, price and time of delivery ; and the vendor's attorney replied to the notice in writing, that the vendor had performed the agreement as far as it had gone, and was ready to complete it ; held, there was a sufficient memorandum within the Statute of Frauds.(2)

7. Whether or not a bill of parcels, in which the name of the vendor is printed, delivered to the vendee at the time of an order for future delivery, is a sufficient memorandum within the Statute ; a subsequent letter, written and signed by the vendor, and referring to the order, may be connected with the bill of parcels, so as to take the case out of the Statute.(3) (See s.14.)

8. An order for goods, written and signed by the vendor in the book of the vendee, may be connected with a letter of the vendor to his agent, mentioning the name of the vendee, and with a letter from the vendee to the vendor, claiming performance of the agreement.(4)

9. Where a contract in writing or note exists, which binds one party, any subsequent note in writing signed by the other binds him, if it either contains in itself the terms of the contract, or refers to a writing which contains them.(5)

10. The defendant, having purchased a lease at auction, wrote to the auctioneer, to send the key of the premises, stating further, that his auctioneer wished to take an inventory of the fixtures. The two auctioneers met, and, having disagreed as to the valuation, appointed an umpire, and enclosed the inventory to him,

(1) Chit. on Contr. (Am. Ed.) 314.

(2) Jackson v. Lowe, 7 Moo. 219. Schneider v. Norris, 2 M. & S. 288, acc.

(3) Saunderson v. Jackson, 2 B. & P. 238. (See 2 B. & C. 947.)

(4) Allen v. Bennet, 3 Taun. 169.

(5) Dobell v. Hutchinson, 3 Ad. & El. 371.

stating the fixtures as belonging to the plaintiff and valued to the defendant. The umpire made a valuation, appraised the fixtures, and returned the inventory, with the appraisement, stamped. The defendant, by letter, requested the plaintiff's auctioneer to remove the fixtures, which was done; and the next day he wrote to the plaintiff that he would attend at the house, and pay the amount due for the fixtures, as appraised. The first and last letters were signed by the defendant, but the first only was stamped. Held, the inventory, appraisement and letters constituted together a sufficient memorandum under the Statute.(1)

11. But where there is a prior insufficient or unsigned written contract, the plaintiff cannot avail himself of subsequent letters from the defendant, recognizing the order for goods, but falsifying or renouncing and disaffirming the terms of the contract.(2)

12. After a defective memorandum of a contract between the plaintiff and defendant, the defendant wrote a letter, admitting the order, but insisting that there had been no seasonable delivery, and therefore he was not bound by the contract. Held, the letter did not aid the memorandum, and that the plaintiff was not at liberty to show by parol evidence, that there was no agreement to deliver within a certain time.(3)*

13. The defendant, having agreed verbally with an agent of the plaintiff, to transfer certain shares in a manufacturing corporation to the plaintiff; wrote to his own agent, directing him to transfer them into the plaintiff's name, and send the certificate to him, the defendant. The plaintiff's agent afterwards agreed in writing, to pay the defendant the stipulated price, when the latter should furnish a certificate. Held, the case

(1) *Hemming v. Perry*, 2 M. & P. 375.

(2) *Chit. on Contr.* (Am. Ed.) 315.

(3) *Cooper v. Smith*, 15 E. 103.

* The above case was recognized in *Richards v. Porter*, (6 B. & C. 437), where the defendant admitted receipt of the invoice, but alleged that it was not seasonably sent. In *Smith v. Surman*, (9 B. & C. 561), the letter of the vendee did not acknowledge the absolute agreement described in that of the vendor, but stated one which was conditional as to the quality. Held, this was a discrepancy, and there was no sufficient memorandum.

showed no written agreement by the defendant, and that parol evidence of his contract was admissible.(1)

14. It is held, that with regard to the form of signature, required by the statute, where a bill of parcels is given, in which the vendor's name is printed, and the vendee's written by the vendor, the latter is bound.(2) (See s. 7.)

15. It seems, where one draws up an agreement with his own hand, and it is thus expressed—"I, A, agree, &c." or "A agrees, &c."; it is a binding contract, though not signed by him.(3)

16. It seems, a signing by one who purports to be a party is sufficient, though he profess to sign as a witness (4)

17. The making of a mark may be a sufficient signing, where the party cannot write, and is identified. But an unsigned contract is bad, though read over to the party by his desire, when written.(5)

18. A letter without signature is no sufficient memorandum of an agreement within the Statute of Frauds. Thus a letter by a mother to her son, beginning "my dear Robert," ending "your affectionate mother," and containing a full direction of the son's name and residence,—is no sufficient note of an agreement.(6)

19. Questions often arise in relation to contracts for the sale or purchase of goods, signed by *agents*. (See *Auction*.)

20. Where a commission merchant sells goods for his principal, and the vendee accepts a bill of parcels, stating him to be the purchaser; such bill is a sufficient memorandum of the agreement. If the sale is for and on account of the principal, it is valid, though the bill does not show his name, and is made out in the name of the agent. Acceptance of the bill is a sufficient recognition by the vendee of the agent's authority to sign. And, the bill of parcels being evidence of a contract, and a suffi-

(1) *Tisdale v. Harris*, 20 Pick. 9.

(2) *Schneider v. Norris*, 2 M. & S. 286.

(3) *Chit. on Contr.* 316, 7.

(4) *Chit. on Contr.* 317.

(5) *Ib.* *Cooper v. Smith*, 15 E. 103.

(6) *Selby v. Selby*, 3 Mer. 2.

cient memorandum, parolevidence is not admissible substantially to vary it (1)

21. Where a broker, employed to purchase goods, writes with a pencil in his book the terms in the body of the memorandum, in presence of both parties; this is sufficient to bind the bargain.(2)

22. A broker, through whom a sale of goods is effected, though first employed by one party, becomes agent of the other also, when he treats with him; it being the practice of brokers to keep books, in which the terms of the contract and names of the parties are entered.(3)

23. A broker cannot delegate his authority without the assent of the principal. Thus, A employed a broker to sell goods. B, wishing to purchase, authorized the broker's salesman to offer a certain price. The salesman brought the parties together, and they concluded an agreement in his absence, and dictated the terms to him. He made an entry, accordingly, in the book of his employer, but did not sign it. He also informed the broker of the facts, who ordered his clerk to enter and sign the contract in his book, and sent a sale-note, signed by himself, to A; but no bought note was sent to B. Held, an insufficient contract under the Statute.(4)

24. So, where he does not, according to the usual course, deliver to the respective parties *bought and sold notes*, transcribed from the books and signed by him. The entry in the book is properly *the original*, and should therefore be signed. The *bought and sold notes* should be mere copies. But perfect notes, signed by him, and delivered to the parties, may constitute a valid contract, though there be no entry or an unsigned one in the book.(5)

25. Where a broker, by mistake, delivers to the parties, re-

(1) *Batturs v. Sellers*, 5 Har. & J. 117.

(2) *Clason v. Bailey*, 14 John. 484. *Merritt v. Clason*, 12. 102.

(3) *Hinde v. Whitehouse*, 7 E. 558. *Heynan v. Neale*, 2 Camp. 337.

(4) *Henderson v. Barnewall*, 1 Y. & Jer. 387.

(5) *Grant v. Fletcher*, 5 B. & C. 437. *Goom v. Afalo*, 6 B. & C. 117. (See 2 C. & P. 544. 4 Bing. 85. 12 Moo. 266.

spectively, sale-notes which differently describe the goods or the terms of contract; the agreement is not binding.(1)

26. A broker, employed by the plaintiff to sell Petersburg clean hemp, and by the defendant to buy hemp, made a sale to the defendant, and by mistake gave him a sale note of *Riga Rhine* hemp, which differed in quality from the Petersburg, and to the plaintiff a note of sale of Petersburg clean hemp. Held, a void contract.(2)

27. It seems, a material variation between the bought and sold notes, delivered to the parties, cannot be corrected or aided by an entry in the book of the broker.(3)

28. A bought and sold note, given to the defendant, mentioned July 1 as the day for cash with discount, at the end of both the sold and bought notes. The note given to the plaintiff specified this day only at the end of the bought note. The plaintiff's note was all written on one sheet. Held, the day named at the end of the bought note applied also to the contract in the sold note; and therefore the plaintiff's note sufficiently corresponded with the defendant's, to make a binding contract.(4)

29. The general principle of the law of agency, that a subsequent ratification of an agent's doings is equivalent to a previous authority, applies to the signing of a contract under the Statute of Frauds.

30. A, without authority, purchased goods for B in writing. B afterwards ratified the purchase. Held sufficient under the Statute of Frauds. The statute leaves it to the common law to determine how an agent shall be authorized. In one respect, a ratification is more satisfactory than a previous authority. In the former case, the principal knows precisely what has been done; while in the latter he must trust to the agent.(5)

31. It has been held, that a broker, who signed the broker's note upon a sale of corn, was the agent of the seller. And if

(1) *Grant v Fletcher*, 5 B. & C. 436.

(2) *Thornton v. Kempster*, 5 Taun. 786. (Sec 1 Star. R. 140. Holt, 172.)

(3) *Thornton v. Meux*, Moo. & M. 43.

(4) *Maclean v. Dunn*, 4 Bing. 722.

(5) *Maclean v. Dunn*, 4 Bing. 722.

the buyer act upon the note, this is a sufficient adoption of the contract to make it binding under the statute.(1)

32. An auctioneer is so far the agent of both parties, though the vendee is himself only an agent, that the auctioneer's signing the name of the vendee or his agent will be a sufficient compliance with the Statute ; unless the auctioneer's authority be revoked by a retraction in his hearing, before the hammer is knocked down or the signature made.(2)

33. An auctioneer, like any other agent for the vendor, need not have a written authority, to render his signature sufficient under the Statute of Frauds.(3)

34. An auctioneer's signing the name of the vendee in his catalogue is not a sufficient compliance with the Statute, unless the conditions of sale are annexed to, or referred to by, such catalogue.(4)

35. In order that a signing by an agent may bind a party, such agent must be some third person, not the other party to the suit. Thus, where an auctioneer wrote the name of the vendee, by his authority, opposite to the lot purchased, and an action was brought against the vendee in the name of the auctioneer ; held, an insufficient signing to charge the defendant.(5)*

36. But an auctioneer's clerk is a third person authorized to sign for the vendee, if done in his presence, and without objection ; and the auctioneer may then maintain an action in his own name (6)

37. Where it is attempted to charge a party by a contract relating to the sale of goods, through some indirect admission

(1) Pal. Pr. & Agent, 143, 2d ed. *Maclean v. Dunn*, 4 Bing. 722.

(2) Chit. on Contr. 318, 9.

(3) *Rucker v. Cammeyer*, 1 Esp. 105. *Clinan v. Cooke*, 1 Sch. & Lef. 22.

(4) *Kenworthy v. Schofield*, 2 B. & C. 945. See *Ib.* 511.

(5) *Farebrother v. Simmons*, 5 B. & Ald. 333. (See *R. & M.* 325. 2 Camp. 203. 1 Nev. & M. 313.)

(6) *Bird v. Boulter*, 1 Nev. & M. 313.

* The rule that a memorandum of a sale of goods, made by an agent having merely parol authority, satisfies the statute of frauds, means that he should be an auctioneer or broker, or other agent of both parties ; not the mere agent of the vendee, or the agent of either party singly ; e. g. a commission merchant authorized to buy goods in behalf of a distant correspondent. *Sewall v. Fitch*, 8 Cow. 215.

subsequent to the original agreement, such admission must be taken all together, so as to give him the benefit of any part of it which is favorable to himself.

38. A agreed with B to sell him twenty five hogsheads of rum at an agreed price, and to furnish the casks. Nothing was specified as to the size of the casks, but the usual size was from 108 to 112 gallons. No rum was delivered, no payment made, nor any memorandum given. Nine days afterwards, the price of the article having in the mean time risen, A informed B that the rum was ready for him, presented a bill of parcels of twenty five hogsheads, averaging 97 gallons, and demanded payment. B paid \$1000 in part satisfaction, remarked that the casks were small, but did not object to receiving them, and the next day sent for and received the rum. Afterwards, B expressed himself as dissatisfied with the quality of the rum, and A thereupon offered to take it back and pay the expenses incurred, but B did not accept the offer. B then brings an action to recover the amount of the difference of price in the number of gallons deficient. Held, the action could not be maintained. The bill of parcels constituted the only binding contract, and the plaintiff, in availing himself of this, must be governed strictly by its provisions. He could not be permitted to accept the acknowledgment of the defendant, made by a specification of twenty five hogsheads as ready for the plaintiff, as a performance of the agreement confessed by the defendant, and then to make use of the same act as evidence to prove another and different contract.(1)

(1) Whitwell v. Wyer, 11 Mass. 6.

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THE END.

ERRATA.

Page 4, 9th line from top, for *literally* read *liberally*.

" 18, 2d " " bottom, for *vendee* read *vendor*.

" 103, 3d " " " " " C read D.

" 105, 8th " " top, for *defendant's* read *plaintiff's*.

" 123, top line, for *cancellage* read *canallage*.

" 138, 15th line from top, for *fixed* read *fired*.

" 177, 9th " " bottom, for *and a* read *and though a*.

" 206, 16th " " " " " *consignor* read *consignee*.

" 238, 4th " " top, dele *not*.

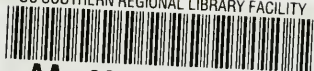
" 256, 10th " " bottom, for *vendor* read *vendee*.

" 257, 14th " " " " " *vendee* read *vendor*.

" 286, bottom line, for *void* read *is void*.

" 304, 6th and 7th lines from bottom, transpose *latter* and *former*.

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